

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

|   |   |                        |
|---|---|------------------------|
| <b>IN THE MATTER OF:</b>                | * |                        |
| <b>BANK OF AMERICA, NATIONAL ASSOC.</b> | * |                        |
| Applicant                               | * |                        |
| Fernanda Assurian                       | * |                        |
| Somer T. Cross                          | * |                        |
| Bradford Fox                            | * | OZAH Case No. CU 17-17 |
| Nick Driban                             | * |                        |
| Edward M. Steere                        | * |                        |
| For the Application                     | * |                        |
| <u>Soo Lee-Cho, Esquire</u>             | * |                        |
| Attorney for the Applicant              | * |                        |

\*\*\*\*\*

Report and Decision by: Martin L. Grossman, Hearing Examiner

Hearing conducted by: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER'S REPORT AND DECISION**

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## **I. STATEMENT OF THE CASE**

On June 9, 2017, the Applicant, Bank of America, National Association (hereinafter, “Bank of America, NA” or the Applicant), filed an application for a Conditional Use pursuant to Zoning Ordinance §59.3.5.14.E, to permit a drive-thru for a bank to be constructed at 16531 Frederick Road, Gaithersburg, Maryland. The site is currently in the CRT (Commercial Residential Town) Zone – CRT-2.25, C-1.5, R-0.75, H-45. Most of the subject property (7.87 acres) is within the County’s zoning jurisdiction and is identified as Parcel B, Block A, Section One, Walnut Hill Subdivision (Tax Account Number 09-00794560). A sliver of the site along the southwest edge (0.40 acres) is within the City of Gaithersburg’s zoning jurisdiction and is identified as Lands of Daniel, Daniel and Daniel, Liber 15248 Folio 55 (Tax Account Number 09-00794571). The site, totaling 8.28 acres, is located in the existing Walnut Hill Shopping Center and is owned by Walnut Hill, LLC, which has authorized the application (Exhibit 4). *See also* amended Application Form, Exhibit 29(a).

The site is in an area subject to the 2010 *Great Seneca Science Corridor Master Plan*. The proposed drive-thru does not meet the limited use standards under Zoning Ordinance Section 59.3.5.14.E.2.a, so the Applicant is seeking conditional use approval.

The Office of Zoning and Administrative Hearings (OZAH) originally scheduled a public hearing to be held on September 22, 2017, but at the request of the Applicant (Exhibit 27), the hearing was postponed to October 30, 2017. Notice of the hearing was issued on September 22, 2017 (Exhibit 28).

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on October 2, 2017, recommending approval of the application, subject to five conditions. Exhibit 33(a). The Planning Board met on October 12, 2017, and voted unanimously (4-0) to recommend approval with the conditions recommended by Staff, with one

minor modification to the first condition. The Planning Board's recommendations are contained in the Chair's letter of October 18, 2017. Exhibit 33.

No correspondence either for or against the application was received by either the Hearing Examiner or Technical Staff (Exhibit 33(a), p. 10). Amended plans were filed on October 25, 2017, and are contained in Exhibits 35(a) and (b).

The public hearing proceeded as scheduled on October 30, 2017. The Applicant called five witnesses –Somer T. Cross, a land planner (Tr. 11-27); Fernanda Assurian, a Bank of America manager (Tr. 27-37); Bradford Fox, a civil engineer (Tr. 37-57, 78-81); Nick Driban, a traffic engineer (Tr. 57-67); and Edward M. Steere, a market demand analyst (Tr. 67-75). An affidavit of posting (Exhibit 36); a staff report on the Adequate Public Facilities (APF) test (Exhibit 38); a composite plan (Exhibit 39); rendered architectural drawings of the proposed elevations (Exhibits 40(a) – 40(d)); an updated composite plan (Exhibit 42); a photometric study (Exhibit 43); and a photo of the existing monument sign (Exhibit 46) were filed at the hearing. There were no other witnesses, and the record was set to close on November 10, 2017. Tr. 83.

On November 6, 2017 (*i.e.*, after the hearing) Trudy M. W. Schwarz, a Planning Division Chief for the City of Gaithersburg, emailed Hearing Examiner Lynn A. Robson, asking that the plans be amended “so that the Canopy of the Drive-Thru not encroach into the parcel of the shopping center that is in the City of Gaithersburg Municipal Jurisdiction. The zoning of the property does not allow the structure.” Exhibit 48.

A new Hearing Examiner, Martin L. Grossman, was assigned to review the entire record in this case and write a report and decision because the Hearing Examiner who conducted the hearing, Lynn A. Robeson, was unavailable due to other obligations. Exhibit 50.

On November 21, 2017, the Applicant filed a letter (Exhibit 60) requesting that the record be reopened to receive revised plans and architectural drawings (Exhibits 60(a) and (b)),

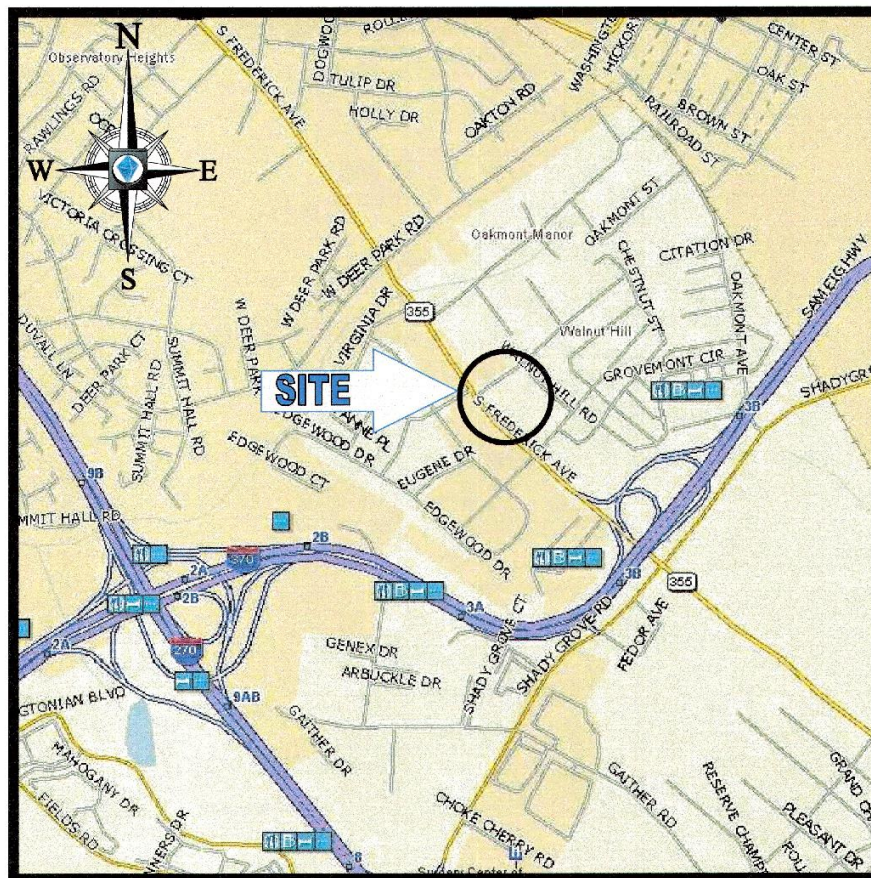
which reflect Applicant's intent to keep the canopy out of the City of Gaithersburg. The Hearing Examiner issued an Order on November 22, 2017, reopening the record until December 7, 2017, to allow for public and Planning Department comments on the revisions by December 4, and any response thereto by December 7. Exhibit 61. No further comments were filed (Exhibit 62), and the record closed, as directed, on December 7, 2017.

For the reasons set forth in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV of this Report and Decision.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The subject site is located at 16531 Frederick Road, Gaithersburg, Maryland, in the existing Walnut Hill Shopping Center. Its location can be seen on the following map from the Cover sheet of the amended plans (Exhibit 60(a)):



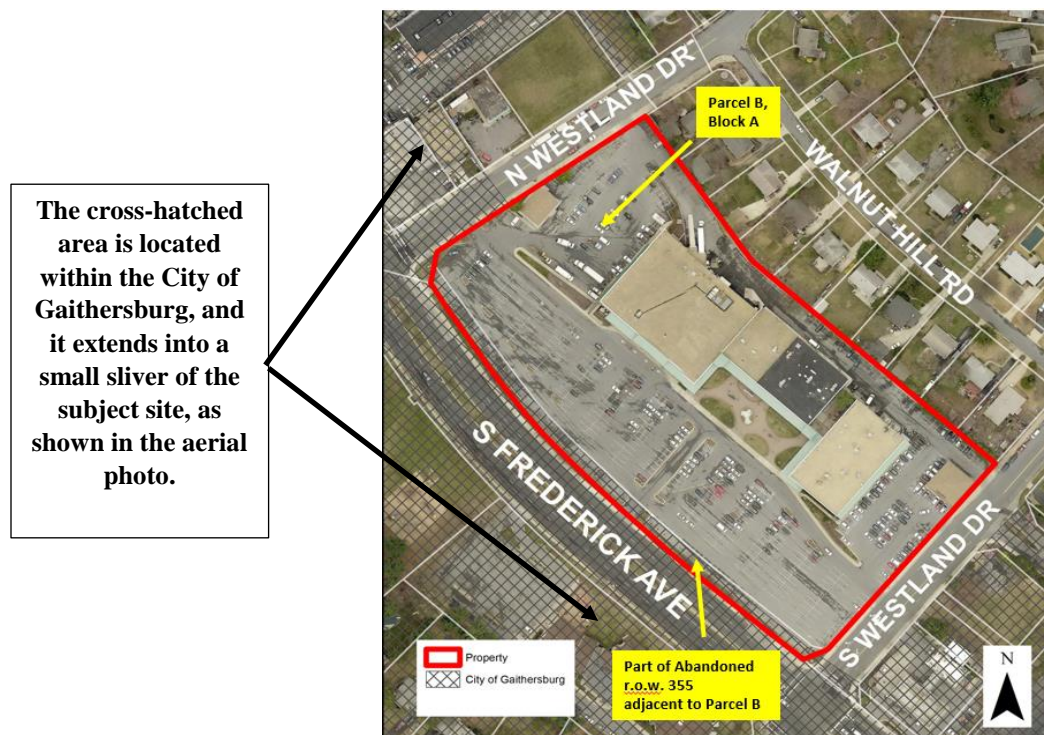
VICINITY MAP

Technical Staff described the property as follows (Exhibit 33(a), p. 2):

The Property is located on the east side of South Frederick Avenue (MD 355) between South Westland Drive and North Westland Drive. It is 8.28 acres zoned CRT-2.25 C-1.5 R-0.75 H-45 [Commercial Residential Town] Zone, and comprises two parcels: the larger, 7.87-acre parcel is described as Parcel B, Block A of the Walnut Hill subdivision [Tax Account Number 09-00794560]; the other parcel is 0.40 acres and described as “part of abandoned Route 355 from Equity Case 31265, adjacent to Parcel B”. The smaller parcel is within the municipal boundary of the City of Gaithersburg.<sup>1</sup>

The Property is generally rectangular with frontage on South Frederick Avenue (MD 355), South Westland Drive, and North Westland Drive. Vehicular access is available from all three roads. It is currently improved with the 99,857-square-foot Walnut Hill Shopping Center and an associated surface parking lot. The shopping center currently includes a grocery store, a Maryland Motor Vehicle Express facility, and various restaurants and retail/ service establishments. The Property also includes two existing pad sites, although the buildings on the pad sites appeared to be empty at the time of Staff’s site visit on July 31, 2017.

Technical Staff considered the entire shopping center to be the subject site, as shown below in an aerial photo from the Staff report (Exhibit 33(a), p. 3):



<sup>1</sup> As noted by Technical Staff, “Because the City of Gaithersburg has zoning authority, the Applicant will need to seek approval from the City for the portion of the conditional use that lies within the municipal boundary.” Exhibit 33(a), p. 2. This smaller parcel is identified on the Applicant’s plans as Lands of Daniel, Daniel and Daniel, Liber 15248 Folio 55 (Tax Account Number 09-00794571).



Plan (Exhibit 42):

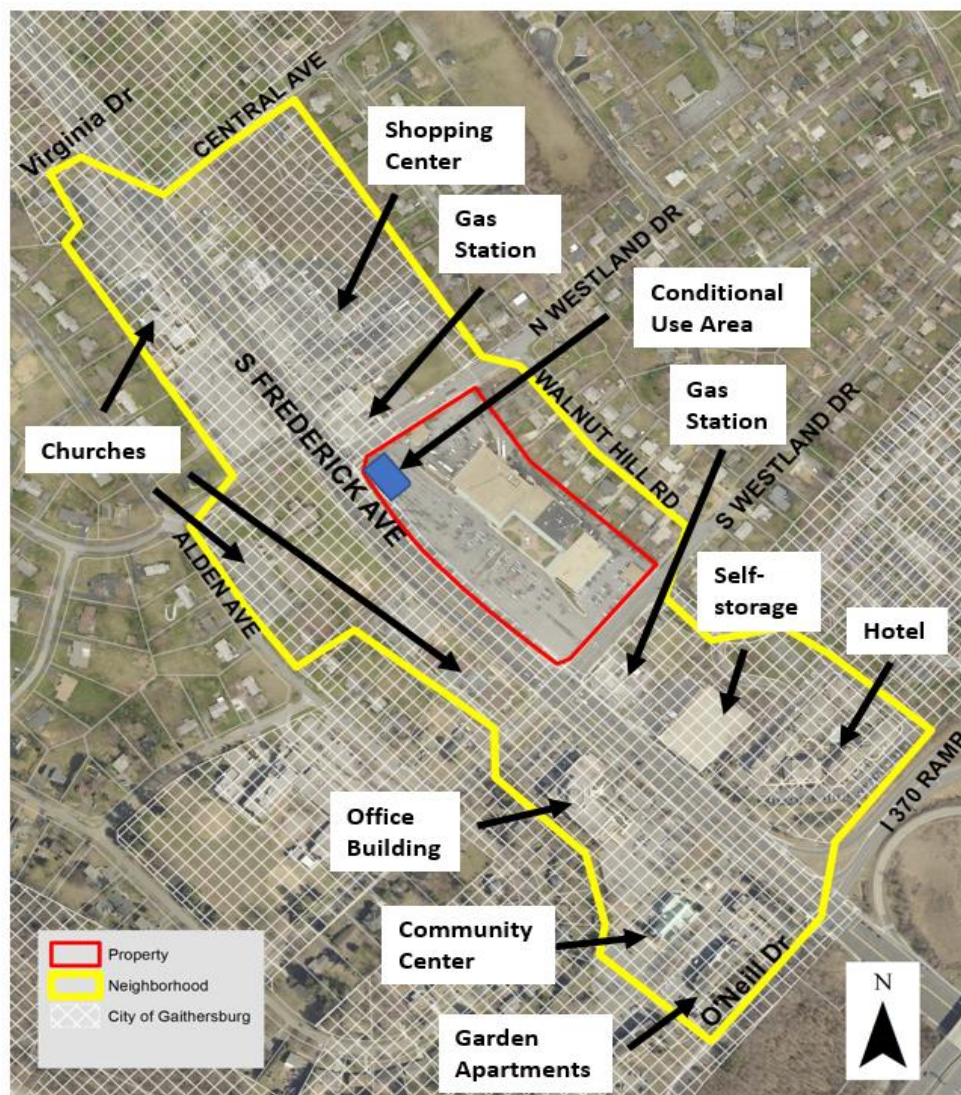


There are no forests, wetlands or other environmental features on the subject site. Exhibit 33(a),

p. 10.

## B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bound by Central Avenue and Virginia Drive to the north, the rear lot lines of properties fronting on South Frederick Avenue to the west, O’Neill Drive and the I-370 interchange to the south, and Walnut Hill Road and various property lines to the east . . . The corporate limits of the City of Gaithersburg surround the shopping center site to the south, west, and northwest, and comprise most of the Neighborhood.” It is depicted below in an aerial photo from the Staff report (Exhibit 33(a), p. 4):



Technical Staff described the neighborhood as follows (Exhibit 33(a), p. 3):

The Neighborhood has a diversity of uses, including residential development, but is primarily commercial and institutional in character. Three religious facilities are located within the Neighborhood, confronting the Property on the west side of South Frederick Avenue. The Neighborhood also includes an office building, a community center, a hotel, a self-storage facility, two gas stations, and various retail/service establishments and restaurants. Detached houses in the R-200 Zone abut the Property to the northeast, and garden apartments are in the southern corner of the Neighborhood, adjacent to O'Neill Drive. Staff did not identify any existing, approved conditional uses in the Neighborhood.

The Applicant accepted Staff's proposed definition of the neighborhood (Tr. 19-20), as does the Hearing Examiner, since it fairly includes those areas that will be most directly impacted by the proposed use.

### **C. Proposed Use**

The Applicant seeks approval of a conditional use to construct and operate a drive-thru serving a bank, as described by Technical Staff (Exhibit 33(a), pp. 4-7):

The Applicant proposes, and has entered a ground lease, to develop a freestanding, one-story full-service Bank of America branch with two drive-thru lanes and walk-up ATM facilities in the northwestern corner of the Property on a 15,645-square-foot area of the existing shopping center parking lot . . . .

The proposed building will be 3,120 square feet with space for tellers, offices, meeting rooms, a vault, and storage space. One or more walk-up ATMS are proposed within the building's vestibule, which will be accessible at any time. Two proposed drive-thru lanes are for drive-up ATM service underneath a canopy adjoining the building. The drive-thru lanes will provide queuing space to accommodate between eight and nine vehicles, including the two vehicles at the transaction positions. One pass-by lane is also proposed. The proposed building height is 21 feet, and the architecture will be consistent with other Bank of America branch facilities. The materials proposed for the building include stucco, glazed storefront, and a metal canopy.

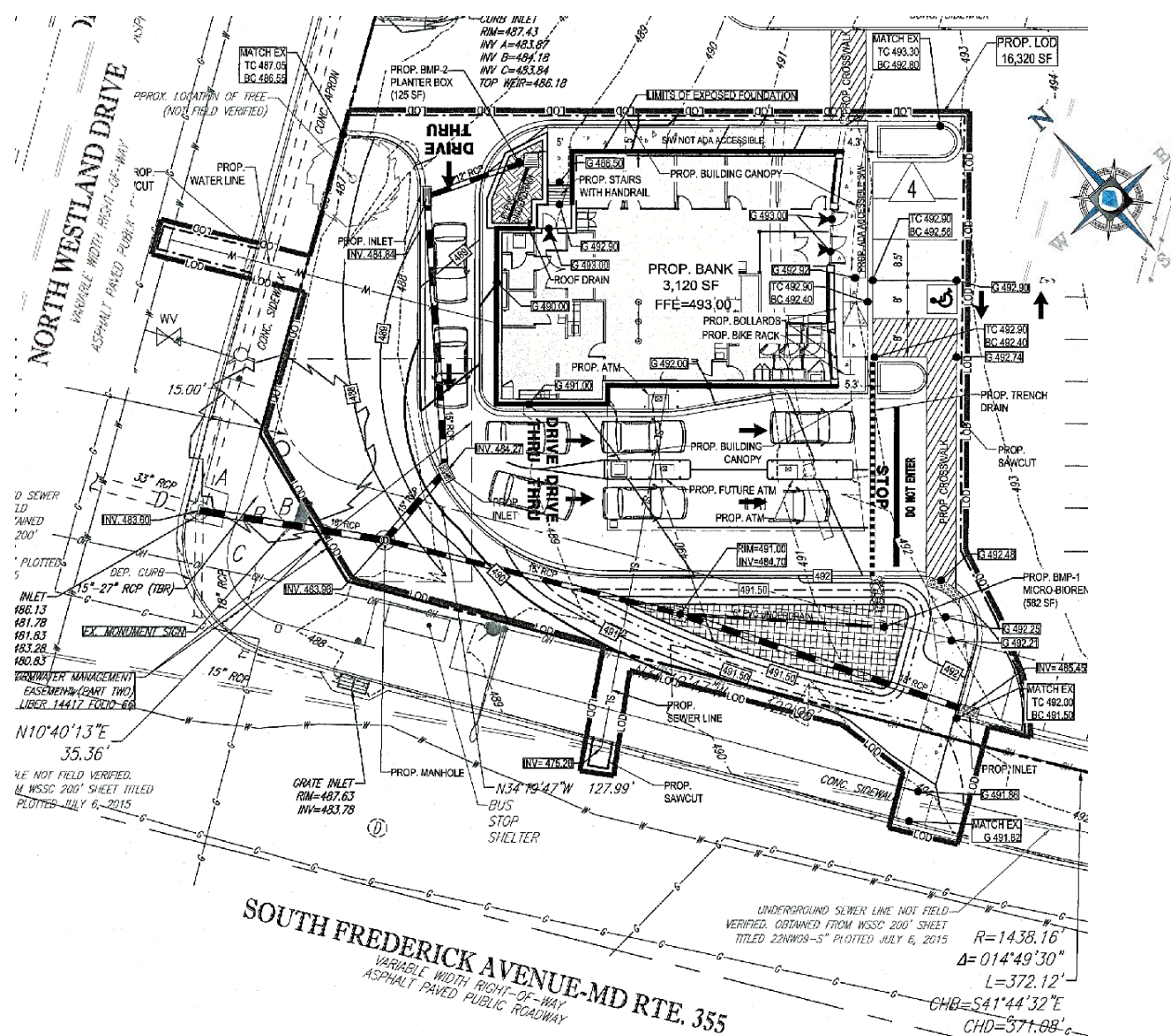
The Applicant is proposing a pedestrian connection between the bank and the sidewalk along South Frederick Avenue. Crosswalks will provide a pedestrian connection between North Westland Drive, the shopping center, and the proposed bank. Four parking spaces, including one handicapped parking space, are proposed on the southeast side of the bank.

Due to existing long-term leases within the shopping center, the proposed bank building could not be located anywhere else on the Property since it would have



## 1. Site Plan and Elevations

The Applicant's Revised Conditional Use Site Layout (Exhibit 60(a)-Sheet 4)) is reproduced below:



The Site Notes, Conditional Use Notes and Development Standards, as shown on the Plan (Exhibit 60(a), Sheet 4), are depicted below:

| <b>C-2 ZONE (UNDER 2004 ZONING CODE)</b>   |   |   |
|--|---|---|
| <b>STANDARD METHOD OF DEVELOPMENT</b>  |   |   |
| <b>DEVELOPMENT STANDARD</b>  | <b>REQUIRED/PERMITTED</b>   | <b>PROPOSED</b>   |
| <b>BUILDING HEIGHT</b>   | 42'   | 36' (MAX BUILDING HEIGHT)   |
| <b>BUILDING SETBACKS</b>   |   |   |
| FRONT:   | 10 FT. MIN. FROM FRONT LOT LINE   | 42' FROM SOUTHWEST CORNER OF PROPOSED BANK TO SOUTH FREDERICK AVENUE RIGHT-OF-WAY |
| REAR:  | NONE, BUT NO YARD LESS THAN 3'  | 46' FROM EXISTING BUILDING TO NORTHEAST LOT LINE                                  |
| SIDE:  | N/A   | 2.7' FROM EXISTING BUILDING TO NORTH LOT LINE                                     |
| <b>GREEN AREA RATIO*</b>   | 10% MIN. OF LOT AREA (36,048 SF)**  | 7.4% (26,684 SF)*   |
| <b>FLOOR AREA RATIO (FAR)*</b>   | 1.5 (540,715 SF)*   | 0.20 (109,207 SF)   |
| <b>BUILDING AREA</b>   | N/A   | 109,207 SF  |
| <b>PARKING SPACES (BASED ON CRT ZONE)</b>  |   |   |
| RETAIL (3.5 SPACES/1000 SF GLA)<br>RETAIL/SERVICE ESTABLISHMENT (3.5 SPACES/1000 SF GLA)<br>RESTURANTS (4 SPACES/1000 PATRON AREA)<br>STORAGE (1/1000 SF SGA)  | RETAIL: 250 SPACES<br>RETAIL/SERVICE ESTABLISHMENT: 61 SPACES<br>RESTURANTS: 33 SPACES<br>STORAGE: 8 SPACES<br><b>TOTAL SPACES REQUIRED: 352 SPACES</b> | <b>PROVIDED: 582 SPACES</b>   |
| <p>*BASED ON OVERALL PROPERTY AREA OF 8.28 ACRES / 360,477 SF.</p> <p>**NOT REQUIRED BECAUSE THE ORIGINAL DEVELOPMENT WAS CONSTRUCTED IN 1967 UNDER THE PREVIOUS ZONING CODE FOR THE C-2 ZONE WHICH REQUIRED 0% GREEN AREA. THE 10% GREEN AREA REQUIREMENT FIRST CAME INTO EXISTENCE IN THE C-2 ZONE WITH THE 1972 ZONING ORDINANCE. THE CURRENT AREA OF THE CONDITIONAL USE PROPOSES A GREEN AREA OF 5,258 SF OR 32.2 % OF GREEN AREA BASED ON THE PROPOSED CONDITIONAL USE AREA OF 16,320 SF.</p> <p>NOTES:</p> <p>1) PURSUANT TO SECTION 7.7.1.C.1 AND SECTION 7.7.1.C.2 OF THE 2014 ZONING ORDINANCE, THE PROJECT IS BEING REVIEWED UNDER THE DEVELOPMENT STANDARDS OF THE PRIOR C-2 ZONE.</p> <p>2) FOUR (4) PARKING SPACES WILL BE PROVIDED WITHIN THE AREA OF THE PROJECT SITE. ADDITIONAL PARKING FOR BANK OF AMERICA IS LOCATED IN THE ADJACENT PARKING AREA.</p> |   |   |

## SITE NOTES

- THIS PLAN IS BASED UPON THE FOLLOWING:  
 PREPARED BY BOHLER ENGINEERING  
 BOUNDARY & TOPOGRAPHIC SURVEY TITLED:  
 "WALNUT HILL SHOPPING CENTER  
 SOUTH FREDERICK ROAD-MD RTE. 355,  
 NORTH WESTLAND DRIVE AND  
 SOUTH WESTLAND DRIVE  
 GAITHERSBURG DISTRICT  
 MONTGOMERY COUNTY, MARYLAND"  
 PREPARED BY: BOHLER ENGINEERING  
 FIELD DATE: 03/24/15  
 DATED: 04/14/15  
 PROJECT NO.: SB142069
- CURRENT ZONING: CRT-2.25 (C-1.6 R-0.75 H-45)  
 PREVIOUS ZONING: C-2 ZONE  
 EXISTING USE: SHOPPING CENTER
- TOTAL FORESTED AREA DISTURBED: 0 SQ FT
- WSSC 200' SHEET NO.: 222NW09
- WATERSHED: MUDDY BRANCH
- NO STREAMS EXIST ON-SITE.
- NO FLOODPLAINS EXIST ON THE PROPERTY PER FEMA  
 MAP #24031C0455D.
- NO WETLANDS EXIST ON-SITE.
- NO KNOWN ENDANGERED SPECIES ARE KNOWN TO EXIST  
 ON THE PROPERTY.
- NO KNOWN HISTORIC FEATURES EXIST ON THE  
 PROPERTY.
- NO TREES GREATER THAN OR EQUAL TO 24 INCHES  
 DIAMETER AT CHEST HEIGHT EXIST ON-SITE.
- NO EXISTING FOREST ON-SITE.
- NO SPECIMEN OF CHAMPION TREES ARE PROPOSED FOR  
 REMOVAL.

## CONDITIONAL USE GENERAL NOTES

- THE CONCEPT REPRESENTED HEREIN IDENTIFIES A DESIGN CONCEPT RESULTING FROM LAYOUT PREFERENCES IDENTIFIED BY OWNER COUPLED WITH A PRELIMINARY REVIEW OF ZONING AND LAND DEVELOPMENT REQUIREMENTS AND ISSUES. THE FEASIBILITY WITH RESPECT TO OBTAINING LOCAL, COUNTY, STATE, AND OTHER APPLICABLE APPROVALS IS NOT WARRANTED AND CAN ONLY BE ASSESSED AFTER FURTHER EXAMINATION AND VERIFICATION OF SAME REQUIREMENTS AND PROCUREMENT OF JURISDICTIONAL APPROVALS.
- THE CONCEPTUAL PLAN IS PREPARED FOR CONCEPTUAL PRESENTATION PURPOSES ONLY AND IS NOT INTENDED FOR UTILIZATION AS A CONSTRUCTION DOCUMENT. THE EXISTING CONDITIONS SHOWN HEREON ARE BASED UPON INFORMATION THAT WAS SUPPLIED TO BOHLER ENGINEERING AT THE TIME OF PLAN PREPARATION AND MAY BE SUBJECT TO CHANGE UPON AVAILABILITY OF ADDITIONAL INFORMATION.

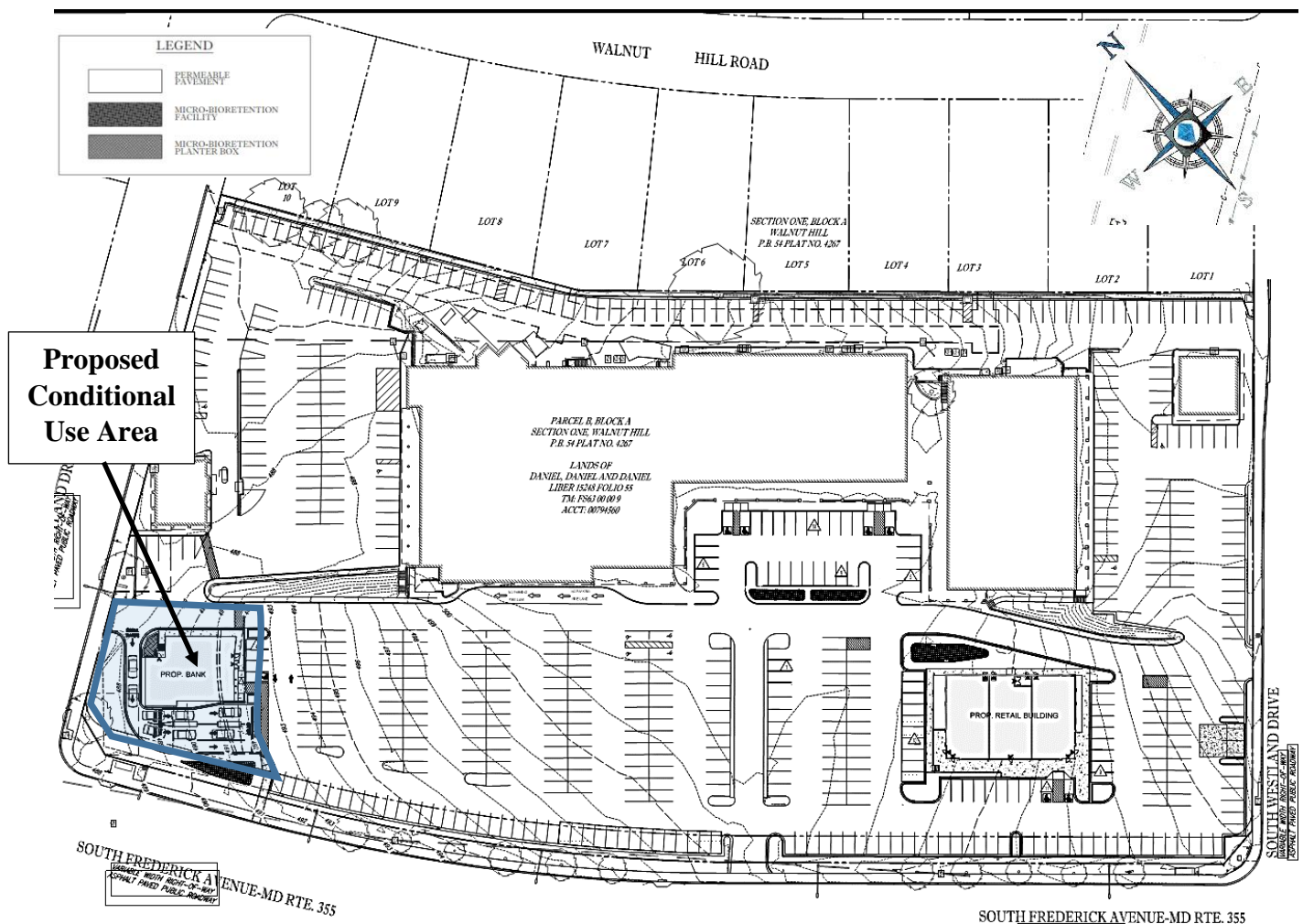
## DEVELOPMENT SEQUENCE:

DEVELOPMENT IS PLANNED TO TAKE PLACE IN ONE PHASE  
 (DEMOLITION, BUILDING, AND SITE WORK).

Applicant's civil engineer and site designer, Bradford Fox, testified as to the rationale for the location and design of the drive-thru conditional use site (Tr. 42):

So the building is located in this corner and has the drive-through wrapping the site. We looked at a couple of alternatives and arrived at this one for being the best to provide queuing, safety and, you know, ease of access. The drive-through configuration you enter from the main driveway that extends across the front of the shopping center building. And it's closest to North Westland Drive. You enter the queue there. There's the two drive through lanes along the bypass lane, a stop bar at the exit that precedes the pedestrian access from 355 that we already discussed, and provides for safe pedestrian travel to the front of the store and also into the building. At the request of Staff, we extended the pedestrian access at the face of the building to an existing sidewalk.

The Applicant also provided a revised "Composite Plan" (Exhibit 42), showing the proposed bank and drive-thru as part of the entire shopping center, as shown below:





Applicant's land planner, Somer Cross, testified that the proposed structures would be "harmonious" and "[would] not alter the character of the area." Tr. 26. A list of stores in the shopping center and the notes from the Composite Plan are reproduced below.

| Unit #  | Tenant - Grouped by Use                  | Square Footage | Ratio                   | Required Parking |
|---|--|----------------|-------------------------|------------------|
| <b>Retail (3.5 spaces/1,000 SF of GLA)</b>  |  |                |                         |                  |
| 8946  | 7-11                                     | 2,400          | 3.5/1000                | 9                |
| 8940  | L & M Music                              | 3,000          | 3.5/1000                | 11               |
| 8934  | W and F, LLC                             | 3,025          | 3.5/1000                | 11               |
| 16567   | Food Lion                                | 32,000         | 3.5/1000                | 112              |
| 16539   | Vacant                                   | 2,790          | 3.5/1000                | 10               |
| 16537   | Montgomery County Liquor                 | 1,824          | 3.5/1000                | 7                |
| 16535   | Montgomery County Liquor                 | 2,400          | 3.5/1000                | 9                |
| 16531   | On the Edge                              | 1,200          | 3.5/1000                | 5                |
| 16529   | B A Ham                                  | 3,014          | 3.5/1000                | 11               |
| 16523   | Vacant                                   | 943            | 3.5/1000                | 4                |
| 16521   | Vapes Social, LLC                        | 1,024          | 3.5/1000                | 4                |
| 16510   | Vacant                                   | 2,168          | 3.5/1000                | 8                |
| 16514   | Baldino's Lock                           | 2,000          | 3.5/1000                | 7                |
| 16536   | WH Cleaner                               | 2,400          | 3.5/1000                | 9                |
| TBD   | Proposed Retail Building                 | 6,137          | 3.5/1000                | 22               |
| TBD   | Proposed Bank of America                 | 3,120          | 3.5/1000                | 11               |
|   | <b>Retail Totals</b>                     | <b>69,445</b>  |                         | <b>250</b>       |
| <input type="checkbox"/> <b>Retail/Service Establishment (3.5 spaces/1,000 SF of GLA)</b> |  |                |                         |                  |
| 16527   | WH Barber                                | 581            | 3.5/1000                | 2                |
| 16525   | Perfectly Polished Nails                 | 616            | 3.5/1000                | 2                |
| 16517   | H&R Block                                | 3,178          | 3.5/1000                | 11               |
| 16512   | Tag & Title                              | 1,960          | 3.5/1000                | 7                |
| 16516   | Korean Martial Arts, Inc.                | 3,114          | 3.5/1000                | 11               |
| 16520   | Maryland MVA                             | 6,018          | 3.5/1000                | 21               |
| 16575   | Hooka Alibaba, LLC                       | 2,000          | 3.5/1000                | 7                |
|   | <b>Retail/Service Totals</b>             | <b>17,467</b>  |                         | <b>61</b>        |
| <b>Restaurants (4 spaces/1,000 SF of Patron Area)</b>                                     |  |                |                         |                  |
| 16533   | Alicia Restaurant - Patron Area          | 1,500          | 4/1000                  | 6                |
| 16533   | Alicia Restaurant - Non-patron Area      | 1,010          | 0/1000                  | 0                |
| 16515   | New Fortune Restaurant - Patron Area     | 6,694          | 4/1000                  | 27               |
| 16515   | New Fortune Restaurant - Non-patron Area | 5,830          | 0/1000                  | 0                |
|   | <b>Patron Area Totals</b>                | <b>15,034</b>  |                         | <b>33</b>        |
| <b>Storage (1 space/1,000 SF GFA)</b>   |  |                |                         |                  |
| 8940  | L & M Music                              | 4,533          | 1/1000                  | 5                |
| 8934  | W and F, LLC                             | 2,635          | 1/1000                  | 3                |
|   | <b>Patron Area Totals</b>                | <b>7,168</b>   |                         | <b>8</b>         |
| <b>Shopping Center Parking Requirements:</b>  |  | <b>109,114</b> |                         | <b>352</b>       |
|   |  |                | <b>Required Parking</b> | <b>352</b>       |
|   |  |                | <b>Supplied Parking</b> | <b>582</b>       |
|   |  |                | <b>Parking Surplus</b>  | <b>230</b>       |



## EXISTING FEATURE NOTES:

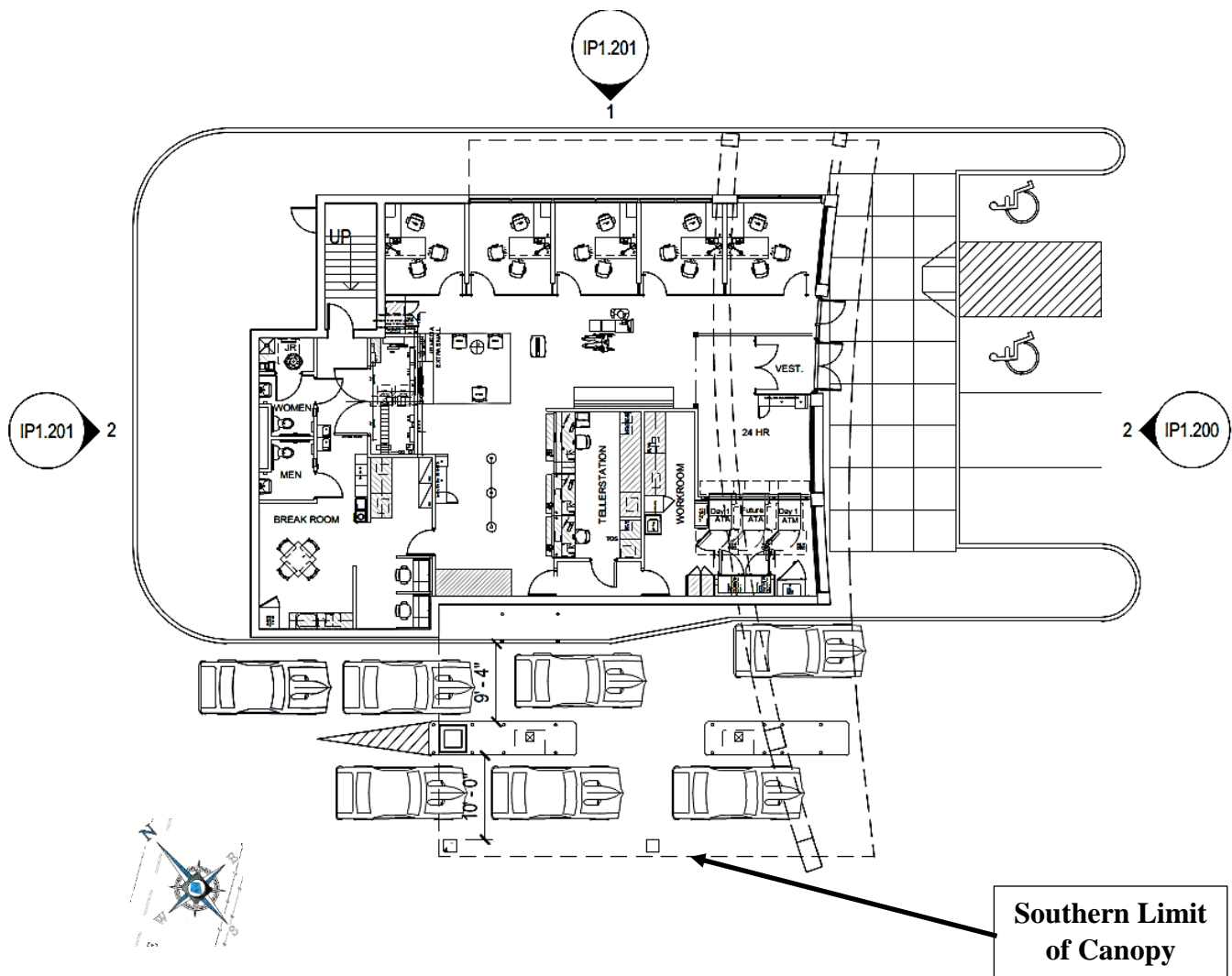
1. THE PROPERTY IS KNOWN AS PARCEL B, SECTION ONE, WALNUT HILL AS RECORDED IN PLAT BOOK 54 AT PLAT NUMBER 4267 AND ALSO BEING THE LANDS OF DANIEL, DANIEL AND DANIEL AS RECORDED IN LIBER 15248 FOLIO 55, AMONG THE LAND RECORDS OF MONTGOMERY COUNTY, MARYLAND AND HAVING A TAX MAP NUMBER OF FS63 00 00 9 PER THE DEPARTMENT OF ASSESSMENTS.
2. OVERALL SITE AREA = 360,477 SQUARE FEET OR 8.275 ACRES
3. LOCATION OF ALL UNDERGROUND UTILITIES ARE APPROXIMATE, SOURCE INFORMATION FROM PLANS AND MARKINGS HAS BEEN COMBINED WITH OBSERVED EVIDENCE OF UTILITIES TO DEVELOP A VIEW OF THOSE UNDERGROUND UTILITIES. HOWEVER, LACKING EXCAVATION, THE EXACT LOCATION OF UNDERGROUND FEATURES CANNOT BE ACCURATELY, COMPLETELY AND RELIABLY DEPICTED. WHERE ADDITIONAL OR MORE DETAILED INFORMATION IS REQUIRED, THE CLIENT IS ADVISED THAT EXCAVATION MAY BE NECESSARY.
4. THIS SURVEY WAS PERFORMED IN THE FIELD ON THE GROUND UTILIZING THE REFERENCE MATERIAL AS LISTED HEREON AND DEPICTS BUILDINGS, STRUCTURES AND OTHER IMPROVEMENTS THEREON, ON MARCH 24, 2015 BY BOHLER ENGINEERING.
5. THE PROPERTY IS LOCATED IN OTHER AREAS ZONE X (AREAS DETERMINED TO BE OUTSIDE THE 0.2% ANNUAL CHANCE FLOODPLAIN) PER MAP ENTITLED "FIRM, FLOOD INSURANCE RATE MAP, MONTGOMERY COUNTY, MARYLAND AND INCORPORATED AREAS, PANEL 193 OF 480, MAP NUMBER 24031C0193D, WITH A MAP EFFECTIVE DATE OF SEPTEMBER 29, 2006.
6. GAS AND WATER UTILITIES ARE SHOWN PER FIELD LOCATION OF ABOVE GROUND STRUCTURE AND PLANS HEREON.
7. CURRENT ZONING: CRT-2.25 (C-1.5 R-0.75 H-45)  
PREVIOUS ZONING: C-2 ZONE

## SITE NOTES

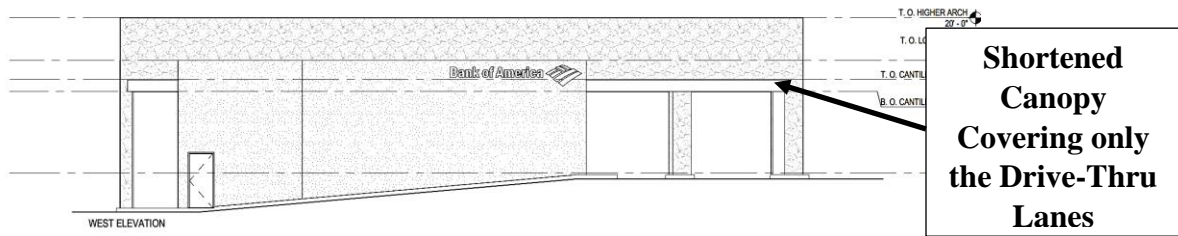
1. THIS PLAN IS BASED UPON THE FOLLOWING:  
 PREPARED BY BOHLER ENGINEERING  
 BOUNDARY & TOPOGRAPHIC SURVEY TITLED:  
 "WALNUT HILL SHOPPING CENTER  
 SOUTH FREDERICK ROAD-MD RTE. 355,  
 NORTH WESTLAND DRIVE AND  
 SOUTH WESTLAND DRIVE  
 GAITHERSBURG DISTRICT  
 MONTGOMERY COUNTY, MARYLAND"  
 PREPARED BY: BOHLER ENGINEERING  
 FIELD DATE: 03/24/15  
 DATED: 04/14/15  
 PROJECT NO.: SB142069
2. CURRENT ZONING: CRT-2.25 (C-1.5 R-0.75 H-45)  
 PREVIOUS ZONING: C-2 ZONE  
 EXISTING USE: SHOPPING CENTER
3. TOTAL FORESTED AREA DISTURBED: 0 SQ FT
4. WSSC 200' SHEET NO. : 222NW09
5. WATERSHED: MUDDY BRANCH
6. NO STREAMS EXIST ON-SITE.
7. NO FLOODPLAINS EXIST ON THE PROPERTY PER FEMA MAP #24031C0455D
8. NO WETLANDS EXIST ON-SITE.
9. NO KNOWN ENDANGERED SPECIES ARE KNOWN TO EXIST ON THE PROPERTY.
10. NO KNOWN HISTORIC FEATURES EXIST ON THE PROPERTY.
11. NO TREES GREATER THAN OR EQUAL TO 24 INCHES DIAMETER AT CHEST HEIGHT EXIST ON-SITE.
12. NO EXISTING FOREST ON-SITE.
13. NO SPECIMEN OF CHAMPION TREES ARE PROPOSED FOR REMOVAL.

In addition to the notations on the Site Layout, conditions are imposed in Part IV of this Report and Decision, at the recommendation of the Planning Board and Technical Staff (Exhibits 33 and 33(a)), requiring that the Applicant obtain sign permits, provide short-term bicycle parking spaces, sidewalk connections, striped crosswalks and plan approvals from the City of Gaithersburg for any improvements within the municipal boundary. The Applicant does not object to any of the conditions recommended by Technical Staff. Tr. 28 and 43.

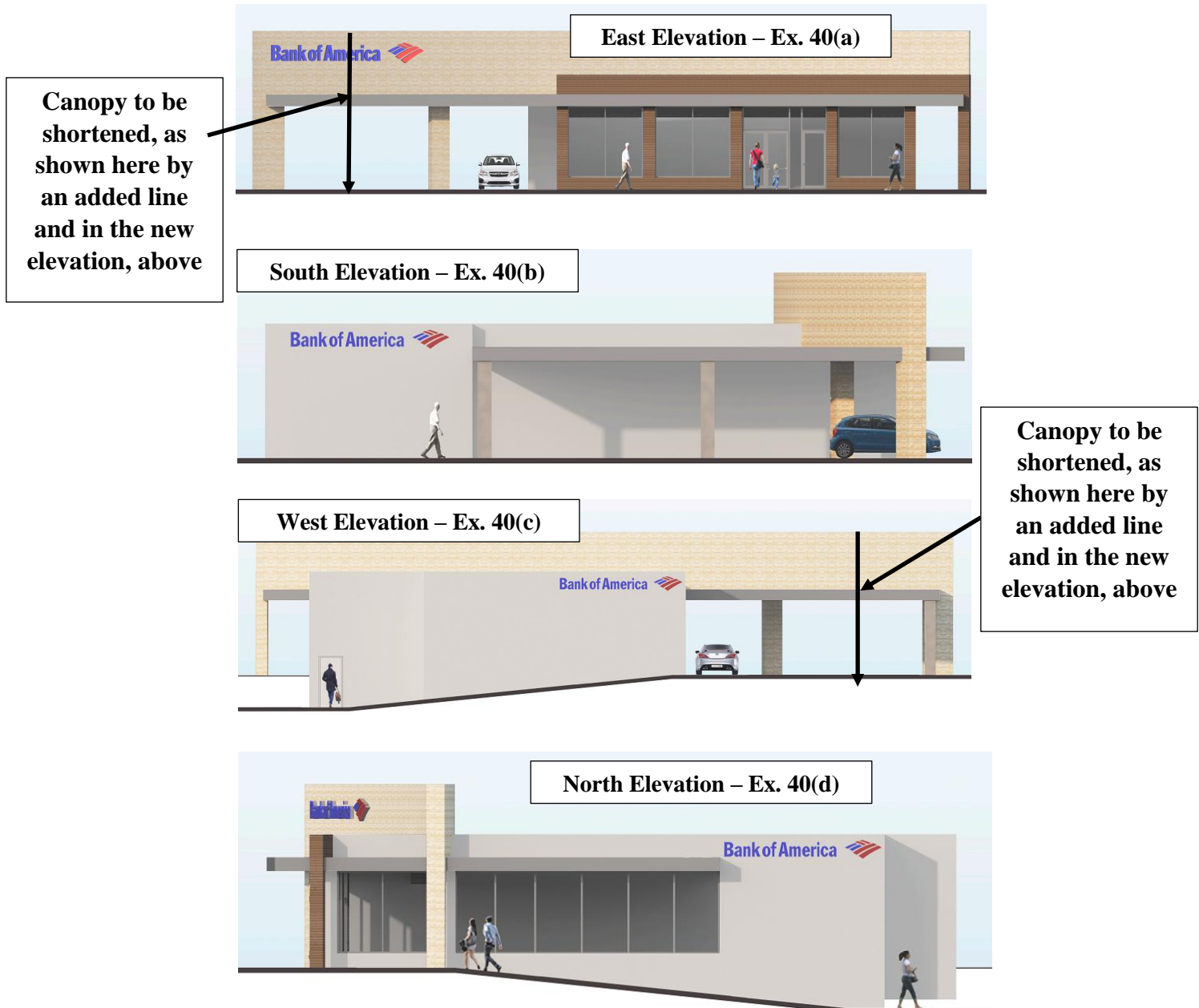
The Applicant has also provided a revised Floor Plan and revised Conceptual Elevations (Exhibit 60(b)) from its architect, which reflect the shortening of the proposed canopy to keep it out of the City of Gaithersburg. Under the revised plans, it will cover only the area to be occupied by the two drive thru lanes, and not the by-pass lane.



The shortening of the canopy can also be seen on the revised west elevation from Exhibit 60(b), reproduced below:



Although the revised elevations demonstrate the reduced canopy, Applicant advises (Exhibit 60) that the original rendered Elevations (Exhibits 40(a) – (d)), more properly show the proposed wall signage (but not the reduced canopy). They are reproduced below:







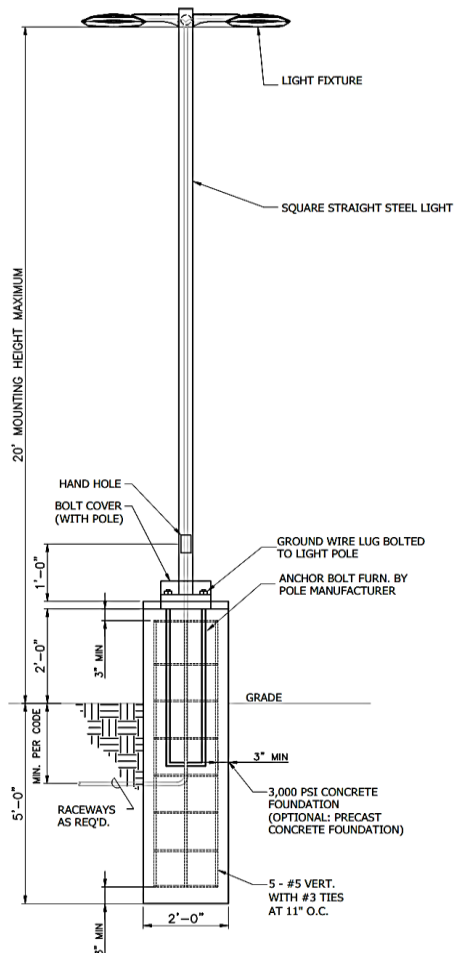
Applicant's site designer, Bradford Fox, testified (Tr. 51-52):

The site requires a minimum of 5 percent of the internal area to surface parking to be landscaped with shade trees. We've provided that. Our site is just the surface parking would be the four spaces here and we also have looked at the drive-through and queuing area also. And we provide that we would need about 283 square feet for 5 percent based on that parking area. And these, even just counting the internal areas here we're over that with approximately 350 square feet of landscaping. . . . and now we've . . . provided over that minimum 10 foot landscape strip.

## b. Lighting Plans

The Applicant submitted a Luminaire Schedule and Photometric Plan (Exhibit 43) with lighting details, some of which are reproduced below:

| Luminaire Schedule |     |                              |             |       |            |     |            |             |
|--------------------|-----|------------------------------|-------------|-------|------------|-----|------------|-------------|
| Symbol             | Qty | Label                        | Arrangement | LLF   | Lum. Watts | Tag | Arr. Watts | Total Watts |
|                    | 2   | ARE-EDG-5M-_-12-E-UL-525-40K | BACK-BACK   | 0.850 | 199        | A1  | 398        | 796         |
|                    | 3   | ARE-EDG-4MB-_-12-E-UL-525-40 | SINGLE      | 0.850 | 198.4      | A2  | 198.4      | 595.2       |
|                    | 3   | SEC-EDG-4M-_-04-E-UL-525-40K | SINGLE      | 0.850 | 68         | W3  | 68         | 204         |
|                    | 12  | CAN-304-5S-_-04-E-UL-350-40K | SINGLE      | 0.850 | 43         | C1  | 43         | 516         |



### LIGHT POLE DETAIL

NOT TO SCALE

### STRUCTURAL NOTES:

1. THE COMPLETE LIGHT POLE ASSEMBLY INCLUDING POLE, CROSS ARM(S), LIGHT FIXTURES AND FOUNDATION MEET THE MINIMUM REQUIREMENTS OF ASCE7-10 AND ACI318-14.
2. WIND LOAD = 115 MPH, RISK CATEGORY "II", EXPOSURE "C"
3. POLE SHALL PROVIDE A MINIMUM EPA RATING OF 3.0 SF

Applicant's engineer, Bradford Fox, testified (Tr. 52-56):

[T]here are lights provided at the front of the building for safety and security and that is the closest point to the existing shopping center where there's already lighting provided for the parking. In addition along the perimeter there is lighting provided facing in towards the Bank and those light levels drop very quickly as you move . . .

The proposed preliminary lighting faces towards the building it's cut off the face and where it also is adjacent to public right-of-ways that have street lighting for the public right of-way along North Westland and also down 355. . . .

The properties . . . across 355 would be zoned residential but . . . there is no glare across 355. [The fixtures] . . . will be full cut off and they'll face the interior.

As will be discussed in Part III of this Report and Decision, the development standards applicable to this application (except for parking spaces) are taken from the 2004 Zoning Ordinance under grandfathering provisions of the 2014 Zoning Ordinance. Thus, the required lighting is governed by 2004 Zoning Ordinance §59-E-2.6, which provides:

***Sec. 59-E-2.6. Lighting.***

*Adequate lighting shall be provided for surface parking facilities used at night and for structured parking as required by construction codes. Lighting shall be installed and maintained in a manner not to cause glare or reflection into abutting or facing residential premises, nor to interfere with safe operation of vehicles moving on or near the premises.*

With regard to lighting, Technical Staff states, "The photometric plan indicates lighting fixtures distributed around the proposed development." Exhibit 33(a), p. 6. Staff concluded that "The illumination for the Property will be appropriate for a drive-thru bank that abuts a major highway . . ." and it "will not cause undue harm to the neighborhood . . ." Exhibit 33(a), p. 16.

From this evidence, the Hearing Examiner finds that the proposed lighting will be adequate and not unduly intrusive into the surrounding neighborhood.

**c. Signs**

Applicant's land planner, Somer Cross, testified that the proposed Bank Building would have wall signage, but the sign plans have not yet been finalized and coordinated with the

shopping center. Tr. 23-26. The currently proposed signs are depicted in the rendered elevations (Exhibits 40(a) – (d)), reproduced on page 15 of this Report and Decision, above.

There are also three existing monument signs for the shopping center. There is one at the southern corner of Frederick Avenue for the stores off to the southeast; one in the middle which is for the grocery store that is the main tenant and shows the name of the entire shopping center; and one on the northwest corner for the shops over on the north. Tr. 23. Technical Staff states (Exhibit 33(a), p. 6) that “The Applicant intends to add a Bank of America sign to the existing monument sign at the corner of South Frederick Avenue and North Westland Drive.” That existing monument sign is depicted below in a photograph from Exhibit 46:



However, the Applicant’s counsel indicated at the hearing that the Applicant was not certain that the sign would be modified, and Applicant’s engineer, Bradford Fox, testified that the sign might have to be moved 5 to 10 feet to get it out of the right-of-way. Tr. 76-81.

The Hearing Examiner finds that neither adding the Bank of America Logo to the sign, nor moving it 5 or 10 feet to get the sign out of the right-of-way, would render it unsafe or incompatible with the neighborhood. Similarly, the Hearing Examiner finds that the proposed wall signs would not be incompatible. Nevertheless, a condition is imposed in Part IV of this Report and Decision requiring the Applicant to obtain sign permits issued by the Department of Permitting Services, the Sign Review Board, or the City of Gaithersburg, as appropriate, for all signs and to file a copy of any such sign permits with this Office.

### **3. Environment - Forest Conservation and Stormwater Management Plans**

The Applicant filed an Existing Conditions Plan (Exhibit 14), reporting that the site contains no streams, wetlands, floodplains, endangered species, existing forests or historic features, and no specimen or champion trees are proposed for removal. Technical Staff confirms that “There are no forests, wetlands, or other environmental features on the Property.” Exhibit 33(a), p. 10.

#### **a. Forest Conservation**

Technical Staff reports (Exhibit 33(a), p. 10):

This application is exempt from the Forest Conservation Plan requirements under Section 22A-5(t) of the Forest Conservation Law (Plan #42015228E) because it is a modification to existing non-residential development.

This conclusion is evidenced by the Planning Department’s Exemption Letter dated July 2, 2015 (Exhibit 13).

#### **b. Stormwater Management Concept Plan**

The Applicant submitted a Stormwater Management Concept Plan (Exhibit 12) with its application. Technical Staff conditioned its recommendation of approval on the Applicant obtaining approval of the stormwater management concept plan from the Department of Permitting Services (DPS), Water Resources Section, prior to the OZAH hearing. The Applicant did so, and the approval letter and the approved, revised Stormwater Management Concept Plan were submitted prior to the hearing (Exhibit 35(a)).

As noted by Technical Staff (Exhibit 33(a), p. 7), “the Applicant will upgrade the stormwater management facilities to comply with current regulations using Environmental Site Design (ESD) techniques to the maximum extent practicable.”

Based on this record, the Hearing Examiner finds that there are no environmental issues in this case.



#### 4. Operations

The Applicant described its intended operations at the subject site in its revised “Statement of Operations” (Exhibit 29(c), p. 2):

The bank will be housed in a single structure with one (1) or more walk-up ATM facilities located in the vestibule of the building and two (2) drive-thru lanes for drive-up ATM service adjoining the building underneath a canopy.

Typical hours of operation of the bank will be from 7:00 a.m. to 8:00 p.m. Monday through Friday, 7:30 a.m. to 6:00 p.m. on Saturday, and 11:00 a.m. to 4:00 p.m. on Sundays. When the bank is closed to the public, secured access to the walk-up and drive-up ATMs will be available at all times.<sup>2</sup> A maximum of 20 full-time employees and/or their part-time equivalents will be employed by the bank for this branch. No more than 12 employees will be working at the site at any one time, which may include technicians and/or home office specialists who will visit the branch office once or twice a week to provide distinct services (equipment repair, training, etc.). Staffing levels are determined by customer flow, with an average of 5 to 6 employees present most of the branch’s open hours.

Bank of America does not use dumpsters or dumpster enclosures due to the nature of the business which requires protection of confidential financial data. Approximately one kitchen-sized bag of kitchen garbage plus confidential trash, which is bagged separately, is removed by a Bank of America courier for shredding/recycling on a daily basis.<sup>3</sup>

The Hearing Examiner has imposed a condition in Part IV of this Report and Decision limiting the number of on-site staff to 12 and requiring the Applicant to comply with its stated operational hours.

Applicant’s civil engineer, Bradford Fox, testified that the two drive-thru lanes and the bypass lane, with a stop bar at the exit that precedes the pedestrian access from Route 355, will provide for safe pedestrian travel to the front of the store and also into the building. He indicated that this arrangement was the best choice to provide queuing, safety and ease of access. Tr. 42. Applicant’s traffic engineer and transportation planner, Nick Driban, testified that the use of the

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<sup>2</sup> *i.e.*, The drive-thru ATMs will operate 24 hours, seven days a week. Tr. 30.

<sup>3</sup> There are no parking spaces designated for loading because few deliveries are made, and they are for a short duration for security reasons. Tr. 35.

proposed location will not create a traffic hazard or traffic nuisance, and that it will not create excessive queuing. Tr. 57-67.

Technical Staff agreed that eight or nine vehicles that can be adequately accommodated within the drive-thru area, and:

the addition of the proposed drive-thru will not be impacted by queuing at the site access point on North Westland Drive because the intersection will continue to operate with little or no delay. The access point will allow free-flow movement into the drive-thru and into the shopping center's main north-south "spine" aisle. To enhance safety for pedestrians and other vehicles in the shopping center parking lot, pavement markings and signs are proposed that will alert motorists leaving the drive-thru lanes to stop before proceeding into the drive aisle. [Exhibit 33(a), p. 9]

Based on this record, the Hearing Examiner finds that vehicular and pedestrian operations on the site can be conducted safely and efficiently.

## **5. County Need for the Drive-Thru**

Unlike most other conditional uses, Zoning Ordinance §59.7.3.1.E.6. requires a finding that:

*a need exists for the proposed use [a Drive-Thru] due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood."*

To meet this requirement, the Applicant offered a "Needs Study" (Exhibit 29(e)) by Edward M. Steere, an expert in market analysis, as well as Mr. Steere's testimony at the hearing. Tr. 67-75. Mr. Steere testified that he defined the relevant market area in geographical terms related to the customers who would likely be served, rather than by drive time, recognizing the Applicant Bank as a neighborhood banking business. The market area is broader than the defined neighborhood for zoning purposes, because the latter only measures impacts such as visibility and traffic. The market area is "bounded by railroad tracks and an interstate highway and then in the northern and northwestern sides of it, it was more or less an isolated buffer between neighborhoods without road connections." Tr. 70-75.

Mr. Steere used census data to determine what the household makeup is in the market area and what people's banking practices were in that area. He noted that "there are no other banking facilities in this neighborhood right now [and] in this particular area more than one-fifth of the residents use Bank of America so they have to travel somewhere else to use the banking services they've already elected to use." Tr. 71-72.

Mr. Steere concluded, in his "Needs Study" (Exhibit 29(e), p. 3):

... that the public need/necessity for the proposed Bank of America Financial Center with drive through ATM's is evident based on our analysis:

- Demand/Supply Balance - We find that the Walnut Hill neighborhood is not supplied with full service, nor drive-through banking facilities, forcing the demand to venture into other markets for basic financial services. Bank of America represents more than one-fifth of the community's banking services, suggesting an imbalance of demand over supply.
- Convenient/Useful - We find that the proposed Bank of America Financial Center with drive-through ATM facilities will not result in a "multiplicity or saturation of similar uses in the same general neighborhood" because the neighborhood is not supported with any full service bank or drive-through banking facility at this time. The Bank of America Financial Center with drive-through ATM's is convenient and useful to the public since it meets the public's need for a full service banking facility that already serves more than one-fifth of the local population. Additionally, the location provides a convenient vehicular access in lieu of traveling into congested commercial areas north and south of Walnut Hill.

As Technical Staff summarized these findings, there is "an imbalance of demand over supply for full service, drive-thru banking facilities in the Walnut Hill neighborhood ... [and] the proposed drive-thru bank will not result in a multiplicity or saturation of similar uses in the same neighborhood ... " (Exhibit 33(a), p. 16). Staff accepted Mr. Steere's findings, as does the Hearing Examiner, in the absence of any contradictory evidence.

#### **D. Community Response**

Technical Staff reports that "The Applicant has satisfied noticing requirements with signs posted along the South Frederick Avenue and North Westland Drive frontages. Staff has received no correspondence about this application." Exhibit 33(a), p. 10. The Hearing Examiner also received no correspondence from the community either for or against the application.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Drive-Thru Conditional Use allowed under Zoning Ordinance Section 59.3.5.14.E.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

#### A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:<sup>4</sup>

#### *E. Necessary Findings*

##### *1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:*

##### *a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;*

Conclusion: As noted by Technical Staff (Exhibit 33(a), p. 11):

The Walnut Hill Shopping Center was originally constructed in 1967 and has never been subject to Preliminary or Site Plan approval.

The Planning Board made an Adequate Public Facilities (APF) determination for the Property in 2015, allowing for an expansion of the existing Shopping Center by 9,999 square feet, for a total of 109,856 square feet of non-residential development on the Property. Since the proposed 3,120-square-foot bank is within the amount of non-residential development approved by the Planning Board’s Resolution MCPB No. 15-78, no further APF review is required for the proposed project.<sup>5</sup>

<sup>4</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.3. and E.6. contain provisions that arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

<sup>5</sup> The Planning Board’s 2015 APF determination was supported by a Staff Report of June 25, 2015 (Exhibit 38).



Based on Technical Staff's determination, the Hearing Examiner finds that the only previous approval for the subject site was the Planning Board's July 9, 2015 Adequate Public Facilities (APF) determination, which allowed a total of 109,856 square feet of non-residential development on the Property. Since the proposed 3,120-square-foot bank is within the amount of non-residential development approved by the Planning Board's Resolution, the Hearing Examiner concludes that the proposed development satisfies the applicable previous approval on the subject site without the need for it to be amended. Thus, this provision is satisfied.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;<sup>6</sup>***

Conclusion: This subsection requires an analysis of the standards of the applicable Zone; the use standards for a Drive-Thru conditional use contained in Article 59-3; and the applicable development standards. These standards are discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 33(a), p. 17), that the application satisfies the relevant requirements.

It should be noted, however, that this analysis differs from the typical case, in that the applicable development standards are found in the 2004 Zoning Ordinance, not the 2014 Zoning Ordinance (except for parking space standards)<sup>7</sup>, because the "grandfathering" provisions of the 2014 Zoning Ordinance allows the application of the C-2 Zone's standards that existed on the site prior to 2014. As explained by Technical Staff (Exhibit 33(a), p. 11):

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<sup>6</sup> As is explained in the main text, the "general requirements under Article 59-6" are not the "applicable" standards in this case, except for parking space standards, as discussed in the next footnote.

<sup>7</sup> The parking standards applied in this case are from the 2014 Zoning Ordinance because, as explained by land planner Somer Cross (Tr. 15-17), the Walnut Hills Shopping Center had asked the Planning Board to apply the 2014 parking space standards of Section 6.2.3, and 6.2.4, when the 2015 APF review was conducted. Application of the 2014 parking space standards is permissible under 2014 Zoning Ordinance §59.7.7.1.B.3.b., when applying to amend the parking requirements of a previously approved application. Those 2014 standards for parking spaces are still applicable.

Pursuant to Sections 7.7.1.C.1 and 7.7.1.C.2 of the current Zoning Ordinance, existing development in a CRT Zone may expand up to the lesser of 10% of the gross floor area approved for the site on October 30, 2014, or 30,000 square feet, following the procedures and standards of the property's C-2 zoning in effect on October 29, 2014. The Applicant is proposing to add 3,120 square feet of non-residential development, which is less than 10% of the 99,857 square feet of development that existed on the Property as of October 30, 2014.

Thus, Part III. B. of this Report and Decision will refer to the 2004 development standards for the pre-existing C-2 Zone, not the 2014 Zoning Ordinance standards for the current CRT-2.25, C-1.5, R-0.75, H-45 Zone, and Part III.D. of this Report and Decision will apply the site development standards of the 2004 Zoning Ordinance, not those of 2014 Zoning Ordinance Article 59-6, except that the 2014 parking space requirements of Article 59-6 will be applied, as they were in the 2015 APF determination (Exhibit 38).

On the other hand, the conditional use standards that apply (as distinguished from the development standards), are entirely those in 2014 Zoning Ordinance §59.3.5.14.E., which permits the granting of a drive-thru conditional use.<sup>8</sup>

***c. substantially conforms with the recommendations of the applicable master plan;***

The subject property lies within the geographic area covered by the *2010 Great Seneca Science Corridor Master Plan*. The Master Plan describes the subject site as part of the “Rosemont, Oakmont, and Walnut Hill” area (MP, pp. 70-71).

The Applicant's revised Statement of Justification (Exhibit 29(b), p. 4) observes:

The proposed Conditional Use site is located within the planning area of the *Great Seneca Science Corridor Master Plan* (“Plan”), which was approved and adopted in June 2010. The property is identified as part of the “Rosemont, Oakmont, and Walnut Hill” area covered by the Plan and is included on Maps 38 and 39. (See Master Plan Excerpt, pgs. 70 and 71) The Plan identifies the property as suitable for general commercial use and confirmed the property's then-existing C-2 General Commercial zoning. The Plan's recommendations for the “Rosemont, Oakmont and Walnut Hill” area included a bullet that addressed the subject shopping center site as follows (see Master Plan Excerpt, pg. 71):

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<sup>8</sup> The Hearing Examiner recognizes that these distinctions, with provisos, are confusing, but they appear to be the intent of the Council in framing the grandfathering provisions of the 2014 Zoning Ordinance.

- Improve stormwater management, reduce impervious surface, increase street tree planting, and incorporate other low impact development and green building techniques if the Walnut Hill Shopping Center redevelops.

As summarized by Technical Staff (Exhibit 33(a), p. 7):

The Property is within the boundary of the *2010 Great Seneca Science Corridor Master Plan*, which designates the Property as part of the “Rosemont, Oakmont, and Walnut Hill” area. The Plan recognizes the Property’s existing retail/commercial use and confirmed the C-2 (General Commercial) Zone on the Property and makes a recommendation to “improve stormwater management, reduce impervious surface, increase street tree planting and incorporate other low impact development and green building techniques if the Walnut Hill Shopping Center redevelops” (page 71). Although this project is not a redevelopment of the shopping center, the Applicant will upgrade the stormwater management facilities to comply with current regulations using Environmental Site Design (ESD) techniques to the maximum extent practicable. . . .

Technical Staff concluded (Exhibit 33(a), p. 7), “The proposed development is therefore in substantial conformance with the Master Plan.” Applicant’s land planner, Somer Cross, testified, “I would completely agree with Staff that it would be in compliance with the Master Plan.” Tr. 26.

Conclusion: There is no evidence in the record contrary to Technical Staff’s findings on this issue. Based on this record and the relevant language of the Master Plan, the Hearing Examiner concludes that the proposed conditional use substantially conforms with the recommendations of the applicable *2010 Great Seneca Science Corridor Master Plan*.

***d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;***

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 37(a), p. 14):

The Neighborhood is primarily auto-oriented commercial and institutional in nature, and the proposed use will be harmonious with the existing uses. As described in the Analysis section, the proposed use is consistent with the recommendations of the Master Plan.

The Hearing Examiner concludes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a commercial use in a commercial neighborhood, and the proposed changes will retain the existing type of use, while

improving the site's stormwater management. As noted above, it is consistent with the applicable Master Plan.

***e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;***

Conclusion: As reported by Technical Staff (Exhibit 33(a), p. 14),

There were no existing, approved conditional uses identified within the Staff defined Neighborhood. The Neighborhood is commercial and institutional, rather than residential, in character and the proposed use is consistent with that character. As described in the Analysis section, the conditional use substantially conforms with the recommendations of the Master Plan, and thus does not alter the nature of the area. The Plan recognized the Property's existing retail/commercial use and confirmed the C-2 (General Commercial) Zone on the Property.

Based on this record, the Hearing Examiner finds that the proposed drive-thru conditional use on the site will not result in an overconcentration of conditional uses in the area; nor will it affect the area adversely or alter the nature of the area, which is commercial, not residential. Moreover, the provision in question also specifies that "*a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area,*" and as noted above, the proposed use is consistent with the Master Plan. Thus, the Hearing Examiner finds that this standard has been met.

***f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:***

***i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities,***

*including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*

*ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and*

Conclusion: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision. Exhibit 33(a), p. 15. Therefore, under §59.7.3.1.E.1.f.i, quoted above, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities.

By its nature, a drive-thru serving a bank will not create any additional burdens for schools. As observed by Technical Staff (Exhibit 33(a), p. 15):

. . . The proposed development will have no impact on schools. Montgomery County Fire Station #8 is approximately 2.5 miles from the Property, and the District 6 Montgomery County Police Station in Derwood is 4.1 miles away. The Property is served by public water (Water Category W-1) and sewer (Sewer Category S-1). As described on pages 8-11 of [the Staff] report, the public roads are adequate to serve the proposed development. . . .

Technical Staff conditioned its recommendation of approval upon DPS's approval of the Stormwater Management Concept Plan, and DPS gave that approval prior to the OZAH hearing, as evidenced by Exhibit 35(a). Thus, public facilities for storm drainage, as well as schools, police, fire, sewer and water are all clearly adequate.

As mentioned above, the Planning Board certified the adequacy of public facilities to serve the shopping center, including transportation facilities, in 2015, and the addition of the bank with a drive-thru falls within the permitted expansion of the shopping center, under that APF finding. The Traffic Impact Analysis (TIA) for the Walnut Hill Shopping Center (Exhibit 38) showed that all studied intersections would operate within Local Area Transportation Review (LATR) Guidelines for the Derwood Policy Area (Critical Lane Volume of 1,475 or less).



Technical Staff noted that “. . . a retail addition of 3,120 square feet generates six additional weekday trips during the morning peak period from 6:30 a.m. to 9:30 a.m. and 24 additional trips during the evening peak period from 4:00 p.m. to 7:00 p.m.” Exhibit 33(a), pp. 9-10. Technical Staff also reviewed traffic operations and queuing as follows (Exhibit 33(a), p. 9):

It is estimated that each of the two drive-thru lanes can accommodate two or three vehicles and an additional two or three vehicles can be accommodated in the single lane queuing area along the north side of the building. This results in a total of eight or nine vehicles that can be adequately accommodated within the drive-thru area.

Due to the proximity of the proposed drive-thru entrance and the nearby site access point from North Westland Drive, operational and queuing analyses were conducted at the site access point. The traffic impact analysis (TIA) and queuing analysis, using the Highway Capacity Manual (HCM), demonstrate that the addition of the proposed drive-thru will not be impacted by queuing at the site access point on North Westland Drive because the intersection will continue to operate with little or no delay. The access point will allow free-flow movement into the drive-thru and into the shopping center's main north-south “spine” aisle.

To enhance safety for pedestrians and other vehicles in the shopping center parking lot, pavement markings and signs are proposed that will alert motorists leaving the drive-thru lanes to stop before proceeding into the drive aisle.

Based on this information, Staff concluded that “. . . the public roads are adequate to serve the proposed development.” Exhibit 33(a), p. 15

Analysis by Applicant's transportation planner, Nick Driban, also found no significant impacts on transportation facilities from the proposed drive-thru conditional use.

Mr. Driban, in his revised Traffic Statement (Exhibit 29(d)), found that:

The TIA showed that with the additional square footage the site access intersection adjacent to the bank drive-thru will operate with a CLV of 234 during the AM peak hour and 268 during the PM peak hour (see Intersection 6 Total CLV on Exhibit 9 in Appendix A). This CLV value is well below the LOS A/B threshold, indicating that the intersection operates with little to no delay. . . .

According to an article from the ITE Journal entitled Queuing Areas for Drive-Thru Facilities . . . , the maximum number of vehicles observed in a bank drive-thru queue was eight (8), based on a detailed study of 15 separate banks throughout the country. . . .

As required in Section 6.2.7.A.1 (Queuing Design Standards) of the Montgomery County Zoning Code, “Any non-Restaurant use must have a minimum of 3 queueing spaces for each drive-thru lane.” The proposed site plan will be able to adequately accommodate at least 8 vehicles in the drive-thru.

The drive-thru lane exceeds the requirements as outlined in the Zoning Ordinance, plus the on-site circulation provides dedicated queuing and on-site circulation and stacking areas that are more than sufficient to handle the queuing for peak period operations. . . .

Based on the results of this analysis, it can be concluded that the proposed site plan:

- 1) Satisfies the requirements of the underlying Montgomery County Zoning Code,
- 2) provides more than enough on-site queuing and site circulation to accommodate the peak period of traffic generation, and
- 3) will not be impacted by queuing at the site access point located in close proximity to the bank drive-thru, which is minimal.

At the hearing, Mr. Driban testified that he concurred with Staff findings in this case (Tr. 64-66):

They found that the pad site located in the northwest corner of the site, next to the site access location is relatively isolated from the rest of the shopping center site which allows vehicles entering and exiting the drive-through to avoid creating a traffic hazard for any other vehicles within the site. . . .

I believe that the traffic is well configured for . . . the proposed pedestrian facilities. There are pavement markings and signage proposed at the exit to the drive-through for the new pedestrian connection there, which would facilitate safe and efficient traffic operations. Tr. 64-66.

As noted above, Technical Staff concluded that “the public roads are adequate to serve the proposed development.” Exhibit 33(a), p. 15. Based on this record, the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities. LATR standards have been met, and the addition of the proposed Drive-Thru conditional use and bank will not unduly burden public facilities.

***g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:***

***i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***

- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood.

*Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” Id.*

As specified in §59.7.3.1.E.1.g., quoted above, inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use. However, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Nevertheless, the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with inherent adverse effects, creates “undue harm to the neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Drive-Thru Conditional Use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the surrounding

neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a drive-thru serving a bank (Exhibit 33(a), p. 15): (1) the building housing the bank, (2) parking facilities, (3) lighting, (4) noise generated by vehicles using the drive-thru, (5) vehicular trips to and from the site by patrons and employees, and (6) long hours of operation. The Hearing Examiner agrees with that listing of inherent characteristics of a drive-thru serving a bank.

Applying those standards to the subject case, Technical Staff “has not identified any non-inherent adverse impacts from the proposed use.” Exhibit 33(a), p. 16. The Hearing Examiner agrees. While any conditional use may have some adverse effects on the neighbors (*e.g.*, from traffic, parking and lighting), there is no characteristic of the proposed use or the site that would differentiate the effects of this proposed drive-thru serving a bank from any other such facility. Thus, the Hearing Examiner finds no non-inherent adverse effects.

Staff then examined the potential impacts of the proposed use (Exhibit 33(a), p. 16):

The proposed drive-thru will not disturb the use, peaceful enjoyment, economic value, or development potential of abutting and confronting properties or the general neighborhood. The proposed development is consistent with the auto-centric nature of this segment of South Frederick Avenue.

The proposed drive-thru will not cause undue harm to the neighborhood due to traffic, noise, odors, dust, illumination, or a lack of parking. As described in the Analysis section, traffic will be accommodated by the existing road network. The noise, odor, dust, and illumination associated with the drive-thru will be comparable to similar facilities. Additional noise generated by vehicles using the drive-thru lanes will be negligible. The illumination for the Property will be appropriate for a drive-thru bank that abuts a major highway, and adequate parking is provided to serve the use.

There will be no undue harm to the health, safety, or welfare of neighboring residents, visitors, or employees because the proposed Conditional Use meets all applicable development standards, and has adequate and safe circulation in and around the site.

Staff concluded, “There is no expected undue harm to the neighborhood because of any non-inherent adverse effect, or a combination of inherent or non-inherent adverse effects.”

Exhibit 33(a), p. 16.

The Hearing Examiner agrees with Staff’s conclusion and finds that the proposed drive-thru serving a bank, as limited by the conditions imposed in Part IV of this Report and Decision, will not cause undue harm to the neighborhood as a result of adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

***2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.***

Conclusion: This provision is not applicable since the proposed use is not in a residential zone.

***3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.***

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

***4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.***

Conclusion: This provision is not applicable since the proposed use is not “an agricultural conditional use.”

***5. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:***  
***a. Filling Station;***



- b. Light Vehicle Sales and Rental (Outdoor);*
- c. Swimming Pool (Community); and*
- d. the following Recreation and Entertainment Facility use: swimming pool, commercial.*

Conclusion: This provision is not applicable since the proposed conditional use is not a listed use.

- 6. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:*
- a. Funeral Home; Undertaker;*
  - b. Hotel, Motel;*
  - c. Shooting Range (Outdoor);*
  - d. Drive-Thru*
  - e. Landfill, Incinerator, or Transfer Station; and*
  - f. a Public Use Helipad, Heliport or a Public Use Helistop.*

Conclusion: This provision is applicable since a “Drive-Thru” is one of the listed uses, and the Need issue was addressed in Part II.C.5. at pp. 22-23 of this Report and Decision. As noted there, Technical Staff summarized the findings in the Need Study (Exhibit 29(e), p. 3) prepared by Applicant’s market analyst, Edward Steere. He found that there is “an imbalance of demand over supply for full service, drive-thru banking facilities in the Walnut Hill neighborhood ... [and] the proposed drive-thru bank will not result in a multiplicity or saturation of similar uses in the same neighborhood . . .” Exhibit 33(a), p. 16. Staff accepted Mr. Steere’s findings, as does the Hearing Examiner, in the absence of any contradictory evidence. The Hearing Examiner concludes, based on the Need Study, that there is a demonstrated County need for the proposed Conditional use.

## **B. Development Standards of the C-2 Zone under the 2004 Zoning Ordinance**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the applicable zone. Although the current zone of the subject site is the CRT-2.25, C-1.5, R-0.75, H-45 Zone, the “grandfathering” provisions of

the 2014 Zoning Ordinance allow the application of the C-2 Zone's standards that existed on the site prior to 2014. As explained by Technical Staff (Exhibit 33(a), p. 11):

Pursuant to Sections 7.7.1.C.1 and 7.7.1.C.2 of the current Zoning Ordinance, existing development in a CRT Zone may expand up to the lesser of 10% of the gross floor area approved for the site on October 30, 2014, or 30,000 square feet, following the procedures and standards of the property's C-2 zoning in effect on October 29, 2014. The Applicant is proposing to add 3,120 square feet of non-residential development, which is less than 10% of the 99,857 square feet of development that existed on the Property as of October 30, 2014.

Thus, this report will refer to the 2004 development standards for the pre-existing C-2 Zone, not the 2014 Zoning Ordinance standards for the current CRT-2.25, C-1.5, R-0.75, H-45 Zone. The development standards in the 2004 Zoning Ordinance for the pre-existing C-2 Zone are depicted below in a Table provided by the Technical Staff (Exhibit 33(a), p. 12):

| <b>Table 1: Development Standards</b> |   |                          |
|---------------------------------------|---|--------------------------|
|                                       | <b>Required/ Allowed under Sec. C-4.35 of 2004 Zoning Ordinance</b> | <b>Existing/Proposed</b> |
| <b>Building Height (max)</b>          | 42'   | 36'                      |
| <b>FAR (max)</b>                      | 1.5   | 0.20                     |
| <b>Setbacks (min)</b>                 |   |                          |
| Front                                 | 10'   | 42'                      |
| Rear setback                          | 30'<br>(Not less than required in adjoining R-200 zone)             | 46'                      |
| <b>Green Area (min)</b>               | 10%   | 7.4%*                    |

\*The shopping center was constructed in 1967 under the C-2 Zone which, at the time, did not have a green area requirement. The 15,645-square foot "conditional use area" proposes a green area of 30.3%.

Staff also noted (Exhibit 33(a), p. 12):

Outside of the "conditional use area", the remainder of the shopping center property, including the site design of the parking lot, is conforming under [2014 Zoning Ordinance] Section 7.7.1.A.1, and will continue to meet the development standards of the C-2 Zone in effect at the time of the shopping center's development.

The only other applicable provisions regarding the C-2 Zone in the 2004 Zoning Ordinance are its Purpose Clause (Section 59-C-4.350) and its Nuisance Clause (Section 59-C-4.355), both of which are set forth below:

**59-C-4.350. Purpose.**

*It is the purpose of this zone to provide locations for general commercial uses representing various types of retail trades, businesses and services for a regional or local area. Typical locations for such uses shall include: central urban commercial areas, regional shopping centers and clusters of commercial development. A further purpose of this zone is to promote the effective use of transit facilities in Central Business Districts by encouraging housing with commercial uses in close proximity to Metro stations located in Central Business Districts.*

**59-C-4.355. Nuisances.**

*Any use which is found by the board to be a public nuisance, by reason of the emission of dust, fumes, gas, smoke, odor, noise, vibration or other disturbance, is and shall be expressly prohibited in the C-2 zone. No such finding shall be made by the board except after a hearing upon reasonable notice, and any person, the commission or the district council may file a petition with the board for such a hearing.*

Conclusion: As can be seen from the above Table, the proposed use meets all the applicable development standards of the C-2 Zone, as provided in 2004 Zoning Ordinance §59-C-4.35, and the Hearing Examiner so finds. Moreover, the proposed development satisfies the Purpose and Nuisance Clauses of the C-2 Zone, in that it will provide commercial services in a shopping center and will not be a public nuisance.

**C. Use Standards for a Drive-Thru Conditional Use (Section 59.3.5.14.E.)**

The specific use standards for approval of a Drive-Thru Conditional Use are set out in Section 59.3.5.14.E. of the Zoning Ordinance. Standards applicable to this application are:

**E. Drive-Thru****1. Defined**

*Drive-Thru means a facility where the customer is served while sitting in a vehicle. Drive-Thru includes drive-thru restaurants, banks, and pharmacies, but does not include Filling Station (see Section 3.5.13.C, Filling Station).*

Conclusion: The Applicant's proposal for a Drive-Thru serving a bank clearly meets the definition of a Drive-Thru in this provision, and the Hearing Examiner so finds.

**2. Use Standards**

- a. Where a Drive-Thru is allowed as a limited use, it must satisfy the following standards:*

- i. A Drive-Thru, including the queuing area, must be located a minimum of 100 feet from any property that is vacant or improved with a residential use in the Agricultural, Rural Residential, or Residential Detached zones.*
- ii. For a Restaurant with a Drive-Thru, access to the site from a street with a residential classification is prohibited.*
- iii. A drive-thru service window, drive aisle, or queuing area located between the street and the front main wall of the main building is prohibited.*
- iv. A drive-thru service window, drive aisle, or stacking area may be located between the street and the side wall of the main building on a corner lot if permanently screened from any street by a minimum 3 foot high wall or fence.*
- v. Site plan approval is required under Section 7.3.4.*
- vi. A conditional use application for a Drive-Thru may be filed with the Hearing Examiner if the limited use standards under Section 3.5.14.E.2.a.i through Section 3.5.14.E.2.a.iv cannot be met.*

Conclusion: The Limited Use standards are not applicable because the Applicant is not able to meet the standards for a limited use under Sections 3.5.14.E.2.a.iii and 3.5.14.E.2.a.iv., quoted above, according to Technical Staff (Exhibit 33(a), p. 12). Section 3.5.14.E.2.a.vi., also quoted above, permits the Applicant to apply for a conditional use in such circumstances, as the Applicant has done in this case.

*b. Where a Drive-Thru is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:*

- i. The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.*

Technical Staff responded to this provision as follows (Exhibit 33(a), p. 13):

As described in the Analysis section, the internal circulation within the shopping center and on the proposed pad site will remain safe and efficient with the addition of the with drive-thru facilities. The pad site is located immediately to the southwest of the nearest shopping center access point from North Westland Drive, at a location that will be relatively isolated from the other parts of the shopping center. Vehicles entering and exiting the drive-thru lanes will not create a traffic hazard for customers shopping at other establishments within the shopping center. Pavement markings will signal vehicles exiting the drive-thru lanes to stop, allowing for pedestrians to safely use the new lead-in sidewalk connecting the sidewalk along South Frederick Avenue with the entrance to the proposed bank. Access to the proposed bank's drive-thru area is internal to the shopping center site, and adequate queuing space will be provided. Operational and queuing analysis demonstrate that the nearby shopping center access point will also remain safe and efficient.

Applicant's traffic engineer and transportation planner, Nick Driban, testified that he concurred with Staff findings in this case (Tr. 64-66):

They found that the pad site located in the northwest corner of the site, next to the site access location is relatively isolated from the rest of the shopping center site which allows vehicles entering and exiting the drive-through to avoid creating a traffic hazard for any other vehicles within the site. . . .

I believe that the traffic is well configured for . . . the proposed pedestrian facilities. There are pavement markings and signage proposed at the exit to the drive-through for the new pedestrian connection there, which would facilitate safe and efficient traffic operations. Tr. 64-66.

As previously discussed in this Report and Decision, Applicant's civil engineer, Bradford Fox, also testified that the two drive-thru lanes and the bypass lane, with a stop bar at the exit that precedes the pedestrian access from Route 355, will provide for safe pedestrian travel to the front of the store and also into the building. He indicated that this arrangement was the best choice to provide queuing, safety and ease of access. Tr. 42. Mr. Driban concluded that the use of the proposed location will not create a traffic hazard or traffic nuisance, and that it will not create excessive queuing. Tr. 57-67.

Conclusion: Based on this record, the Hearing Examiner finds that the proposed conditional use will not create a traffic hazard or traffic nuisance, and it therefore satisfies this provision.



- ii. The use of the proposed location will not preempt frontage on any highway or public road in a way that reduces the visibility and accessibility of an interior commercial area zoned or proposed for commercial use that is oriented to the same highway or public road.***

Conclusion: As stated by Technical Staff (Exhibit 33(a), p. 13),

Most of the stores in the existing shopping center are located southeast of the proposed bank, so the visibility of the existing establishments from South Frederick Avenue will remain unchanged. Pedestrian accessibility of the shopping center will be enhanced with the addition of a new lead-in sidewalk and marked crosswalks within the parking lot.

The Hearing Examiner finds that the proposed conditional use will not preempt frontage in a way that reduces visibility or accessibility of an interior commercial area, and it therefore satisfies this provision.

- iii. Product displays, parked vehicles, and other obstructions that adversely affect visibility at intersections, or at entrances and exits to and from the Drive-Thru are prohibited.***

Conclusion: As stated by Technical Staff (Exhibit 33(a), p. 13),

The Applicant does not propose product displays, vehicle parking, or other obstructions that would adversely affect visibility at the Property's ingress and egress driveways. Parked vehicles will be separated from the proposed drive-thru entrances and exits by a drive aisle or physical barrier, allowing appropriate visibility of the drive-thru lane. No intersections will be impacted because access to the drive-thru area is from the interior of the existing shopping center parking lot.

Based on this record, the Hearing Examiner finds that the proposed conditional use will not have product displays, vehicle parking, or other obstructions that would adversely affect visibility at intersections, or at entrances and exits to and from the drive-thru. The proposal therefore satisfies this provision.

- iv. When a Drive-Thru occupies a corner lot, the ingress or egress driveways must be located a minimum of 20 feet from the intersection of the rights-of-way, and such driveways must not exceed 25 feet in width. In areas where no master plan of highways has been adopted, the street line must be considered to be a minimum of 60 feet from the centerline of any abutting street or highway.***

Conclusion: The Applicant's revised Statement of Justification (Exhibit 29(b), pp. 7-8) argues that this subsection is "Not applicable [because] [t]he proposed Conditional Use site is not a corner lot, but is a small portion of a larger shopping center site." However, Applicant's land planner, Somer Cross, quoted this provision in her testimony and stated (Tr. 22):

. . . This actual property takes up an entire block, therefore it is in effect, two corners, but the egress and ingress of the site remain the same. It is off of North Westland Drive and that is more than 90 feet from the intersection of South Frederick Avenue.

Technical Staff concluded that the subject site was a corner lot, but it nevertheless satisfied the requirements of this provision (Exhibit 33(a), p. 13):

The drive-thru occupies a corner lot. The ingress and egress driveways for the drive-thru are within the shopping center parking lot, and the nearest access point for the shopping center, from North Westland Drive, is over 90 feet from the intersection of North Westland Drive and South Frederick Avenue.

Based on this record, the Hearing Examiner finds that, whether or not this is considered a "corner lot," the proposed ingress or egress driveways will be located more than a minimum of 20 feet from the intersection of the rights-of-way. The Hearing Examiner also notes, based on the final plans (Exhibit 60(a)), that the planned driveways will not exceed 25 feet in width. The second sentence of subsection iv. (quoted in the footnote, below)<sup>9</sup> does not appear to be an additional requirement, but rather an instruction on how to interpret the first sentence of that provision. Unfortunately, it is difficult to tease out the intent behind the second sentence because it refers to a "street line" which is not mentioned in the first sentence. Nevertheless, given Staff's finding that "the nearest access point for the shopping center, from North Westland Drive, is over 90 feet from the intersection of North Westland Drive and South Frederick Avenue," it is clear that the 20-foot minimum has been satisfied.

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<sup>9</sup> "In areas where no master plan of highways has been adopted, the street line must be considered to be a minimum of 60 feet from the centerline of any abutting street or highway."

In sum, the Hearing Examiner finds that the application satisfies all of the use standards for a Drive-Thru Conditional Use set forth in Zoning Ordinance Section 59.3.5.14.E.2.b., as well as the general Conditional Use standards contained in Zoning Ordinance §59.7.3.1, discussed in Part III.A., above.

#### **D. Applicable Site Development Standards**

Article 59.6 of the 2014 Zoning Ordinance ordinarily sets the general requirements for site access, queuing, parking, screening, open space, landscaping, lighting, and signs. For the reasons stated on pages 25-26 of this Report and Decision, only the parking space standards of the 2014 Zoning Ordinance (*i.e.*, Sections 59.6.2.3 and 6.2.4) apply in this case, and the remainder of the applicable development standards are those that apply to the C-2 Zone of the 2004 Zoning Ordinance. The applicable requirements, and whether the use meets these requirements, are discussed below.

##### **1. Parking Spaces Required under the 2014 Zoning Ordinance**

As previously mentioned, the site development standards for parking spaces are governed by Division 6.2.4 of the 2014 Zoning Ordinance. The required number of spaces is referenced in the Table on page 14 of the Staff report (Exhibit 33(a)). It is reproduced below:

| <b>Table 2: Parking Requirements under Section 6.2.4</b> |   |   |
|--|---|---|
|  | <b>Required</b>                               | <b>Proposed</b>   |
| <b>Vehicle Parking</b>                                   |   |   |
| Proposed Bank  | <b>11</b><br>(3.5 spaces per 1,000 SF of GFA) | <b>11 total</b><br>4 (conditional use area);<br>7 (shopping center) |
| Overall Shopping Center                                  | 352   | 586   |
| <b>Bicycle Parking</b>                                   |   |   |
| Proposed Bank  | 1   | 2   |

Conclusion: As can be seen from the above Table, Section 59.6.2.4 of the 2014 Zoning Ordinance requires 3.5 vehicle parking spaces per 1,000 square feet of gross floor area (GFA). Since the Applicant plans a total of 3,120 square feet of GFA, a total of 11 parking spaces for the

subject site would be required ( $3.12 \times 3.5 = 10.92$  spaces, which rounds up to 11). The Applicant complies by providing 4 spaces in the conditional use area and 7 in the shopping center parking lot.

Staff reports that the overall shopping center is required to have a minimum of 352 vehicle parking spaces, and it more than meets that minimum with 586 vehicle parking spaces. One bicycle parking space is also required by the Code for the conditional use, but the Applicant will provide 2 bicycle spaces. One of the conditions recommended by Technical Staff is that “The Applicant must provide at least two short-term bicycle parking spaces (inverted-U bike rack(s) or equivalent as approved by the Planning Department staff) near the proposed bank’s main entrance.” The Hearing Examiner has employed a similar condition in Part IV of this Report and Decision.

Based on this record, the Hearing Examiner finds that the Applicant’s proposal is compliant with the provisions specifying the number of required vehicle and bicycle parking spaces.

## **2. Site Lighting, Screening and Landscaping under the 2004 Zoning Ordinance**

As discussed above, the site development standards for site lighting, screening and landscaping are, in this case, derived from the 2004 Zoning Ordinance, based on the grandfathering provisions of the 2014 Zoning Ordinance.

### ***a. Lighting***

In this case, lighting in parking facilities is governed by 2004 Zoning Ordinance §59-E-2.6:

#### ***Sec. 59-E-2.6. Lighting.***

*Adequate lighting shall be provided for surface parking facilities used at night and for structured parking as required by construction codes. Lighting shall be installed and maintained in a manner not to cause glare or reflection into abutting or facing residential premises, nor to interfere with safe operation of vehicles moving on or near the premises.*

The lighting to be provided under the proposed development was set forth in a Luminaire Schedule and Photometric Plan (Exhibit 43). Lighting was addressed in Part II.C.2.b. of this Report and Decision (pp. 17-18). As mentioned there, Applicant's engineer, Bradford Fox, testified (Tr. 52-56):

[T]here are lights provided at the front of the building for safety and security and that is the closest point to the existing shopping center where there's already lighting provided for the parking. In addition along the perimeter there is lighting provided facing in towards the Bank and those light levels drop very quickly as you move . . .

The proposed preliminary lighting faces towards the building it's cut off the face and where it also is adjacent to public right-of-ways that have street lighting for the public right-of-way along North Westland and also down 355. . . .

The properties . . . across 355 would be zoned residential but . . . there is no glare across 355. [The fixtures] . . . will be full cut off and they'll face the interior.

Technical Staff noted that, "The photometric plan indicates lighting fixtures [are] distributed around the proposed development." Exhibit 33(a), p. 6. Staff concluded that "The illumination for the Property will be appropriate for a drive-thru bank that abuts a major highway . . ." and it "will not cause undue harm to the neighborhood . . ." Exhibit 33(a), p. 16.

Conclusion: Based on this record, the Hearing Examiner finds that the quoted provision of the 2004 Zoning Ordinance will be satisfied. Adequate lighting will be provided for the parking facilities, and it will be installed in a manner so as not to cause glare or reflection into abutting or facing residential premises, nor to interfere with safe operation of vehicles moving on or near the premises.

#### ***b. Site Screening and Landscaping***

In this case, screening and landscaping in parking facilities are governed by 2004 Zoning Ordinance §59-E-2.7. The subsections therein generally call for a minimum of 5 percent of the internal area of a surface parking facility to be landscaped with shade trees, and for perimeter landscaping. However, Section 59-A-2.1 of the 2004 Zoning Ordinance, defines an automobile



parking facility as one “used for off-street parking of 6 or more motor vehicles,” so the plan for a conditional use site with only four parking spaces may not actually trigger the landscaping and screening requirements of 2004 Zoning Ordinance §59-E-2.7.

Nevertheless, Applicant’s landscape plan (Exhibit 60(a), Sheet 6) requires Applicant to plant 7 shade trees, 22 evergreen shrubs and 7 deciduous shrubs around the conditional use site. That plan is reproduced and discussed in Part II.C.2.a. of the Report and Decision (pp. 16-17).

As mentioned there, Applicant’s engineer, Bradford Fox, testified (Tr. 51-52):

The site requires a minimum of 5 percent of the internal area to surface parking to be landscaped with shade trees. We've provided that. Our site is just the surface parking would be the four spaces here and we also have looked at the drive-through and queuing area also. And we provide that we would need about 283 square feet for 5 percent based on that parking area. And these, even just counting the internal areas here we're over that with approximately 350 square feet of landscaping. . . . and now we've . . . provided over that minimum 10 foot landscape strip.

Technical Staff reports that “In addition to trees and shrubs around the building, shade trees are proposed on both frontages . . . .” Exhibit 33(a), p. 6. According to Staff (Exhibit 33(a), p. 12), “the site design of the parking lot is conforming under [2014 Zoning Ordinance] Section 7.7.1.A.1, and will continue to meet the development standards of the C-2 Zone in effect at the time of the shopping center’s development.”

Conclusion: Under Section 59.7.3.1.E.1.b. of the 2014 Zoning Ordinance, the Hearing Examiner need only find that the proposed use meets applicable general development requirements “to the extent the Hearing Examiner finds necessary to ensure compatibility. . . .” Staff reported no deficiency in the proposed site landscaping and screening.

Based on this record, the Hearing Examiner finds that the proposed site landscaping and screening are compliant with the requirements of the 2004 Zoning Ordinance and sufficient to ensure compatibility with the surrounding commercial neighborhood, in accordance with the conditional use standards of the 2014 Zoning Ordinance.

### **3. Signage under the 2004 Zoning Ordinance**

In this case, proposed signage is governed by 2004 Zoning Ordinance §59-F-4.2(b), based on the grandfathering provisions of the 2014 Zoning Ordinance. That Section governs signage in commercial and industrial zones. According to Applicant's land planner, Somer Cross, the proposed bank building would have wall signage, but the sign plans have not yet been finalized and coordinated with the shopping center. Tr. 23-26. The currently proposed signs are depicted in the rendered elevations (Exhibits 40(a) – (d)), reproduced on page 15 of this Report and Decision.

As reported in Part II.C.2.c. of this Report and Decision, there are also three existing monument signs for the shopping center. Tr. 23. Technical Staff states (Exhibit 33(a), p. 6) that "The Applicant intends to add a Bank of America sign to the existing monument sign at the corner of South Frederick Avenue and North Westland Drive." That existing monument sign is depicted in a photograph reproduced on page 19 of this Report and Decision.

However, the Applicant's counsel indicated at the hearing that the Applicant was not certain that the sign would be modified, and Applicant's engineer, Bradford Fox, testified that the sign might have to be moved 5 to 10 feet to get it out of the right-of-way. Tr. 76-81.

Conclusion: As previously mentioned, application of general development requirements for conditional use applications (whether derived from the 2004 Zoning Ordinance or the 2014 Zoning Ordinance) is governed by Section 59.7.3.1.E.1.b. of the 2014 Zoning Ordinance. Under that section, the Hearing Examiner need only find that the proposed use meets applicable general development requirements "to the extent the Hearing Examiner finds necessary to ensure compatibility. . ."

Based on this record, the Hearing Examiner finds that neither adding the Bank of America Logo to the sign, nor moving it 5 or 10 feet to get the sign out of the right-of-way, would render it

unsafe or incompatible with the neighborhood. Similarly, the Hearing Examiner finds that the proposed wall signs would not be incompatible with this commercial neighborhood. If the Applicant subsequently elects to change those signs, any signage must comply with applicable Zoning Ordinance standards and is subject to permits issued by the Department of Permitting Services, the Sign Review Board, or the City of Gaithersburg, as appropriate. A condition is imposed in Part IV of this Report and Decision to that effect.

#### IV. CONCLUSION AND DECISION

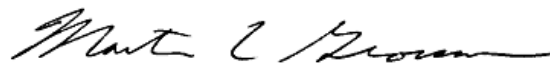
As set forth above, the application meets all the standards for approval in the applicable portions of the 2004 and 2014 Zoning Ordinances. The proposed conditional use complies with the general conditions and the standards for approval of a conditional use for a Drive-Thru, subject to the recommended conditions of approval. The proposed conditional use is consistent with the objectives and recommendations of the Master Plan, will not alter the character of the surrounding neighborhood, and will not result in any unacceptable noise, traffic, or environmental impacts on surrounding properties.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Bank of America, National Association (CU 17-17), for a conditional use under Section 59.3.5.14.E, of the Zoning Ordinance, to build and operate a drive-thru servicing a bank at 16531 Frederick Road, Gaithersburg, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant must obtain sign permits, issued by the Department of Permitting Services, the Sign Review Board, or the City of Gaithersburg, as appropriate, for all signs and must file a copy of any such sign permits with the Office of Zoning and Administrative Hearings (OZAH).
2. The Applicant must provide at least two short-term bicycle parking spaces (inverted-U bike rack(s) or equivalent as approved by the Planning Department staff) near the proposed bank's main entrance.

3. Prior to issuance of the final use and occupancy permit for the proposed bank, the Applicant must provide the sidewalk connections and striped crosswalks shown on the conditional use plan.
4. Prior to issuance of any building permit, the City of Gaithersburg must approve any proposed improvements to the Property that lie within the City's municipal boundary. The Applicant must also provide the City of Gaithersburg with copies of all permits, plans and easement/maintenance documents reviewed and approved by the Department of Permitting Services for construction of the bank facility as required by the City.
5. The Applicant is bound by its site layout and other plans filed this case (Exhibits 60(a), Sheets 1 through 7).
6. The Bank of America branch and the associated drive-thru may be open for business from 7:00 a.m. to 8:00 p.m. Monday through Friday, 7:30 a.m. to 6:00 p.m. on Saturday, and 11:00 a.m. to 4:00 p.m. on Sundays. The drive-thru ATMs may operate 24 hours, seven days a week. The bank may have up to 12 staff members on-site staff at any time.
7. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 8<sup>th</sup> day of December, 2017.



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Martin L. Grossman  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

#### NOTICES TO:

Soo-Lee Cho, Esquire  
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All parties of record  
Barbara Jay, Executive Director, Montgomery County Board of Appeals  
Ehsan Motazed, Department of Permitting Services  
Greg Nichols, Manager, SPES at DPS  
Alexandre A. Espinosa, Director, Finance Department  
Charles Frederick, Esquire, Associate County Attorney  
Gwen Wright, Director, Planning Department  
Emily Tettelbaum, Planning Department  
Washington Suburban Sanitary Commission  
State Highway Administration